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SIR MAURICE SHELDON AMOS, K.C.

THE death of Sir Maurice Amos removes a colourful personality from the legal world. After a career of distinction in the Egyptian service, broken by some years of valuable work in the Ministry of Munitions during the war of 1914–1918, he retired to England, and after a short time became Quain Professor in the University of London. Here his unusually wide experience and unconventional approach proved a great stimulus to his colleagues among whom he at once secured an influential position, being elected Dean of the Faculty comparatively soon after his appointment. It was through contacts made in the University that he became interested in the project of founding the Modern Law Review which immediately secured his wholehearted support, on the Editorial Board of which he served from the first, and to which he gave valuable counsel. His passing makes the first gap in our ranks.

Eminent as were Sir Maurice's services to the law, and valuable as were his literary contributions, particularly his succinct and lucid study of the British Constitution, and his studies in the modern civil law, his personality overtowered his achievements. His fine head and rugged features attracted attention in any company, and this would be retained indefinitely by the wit, vigour and breadth of his conversation. No one who met him could fail to take away a vivid recollection of the encounter, while those who had the benefit of a more intimate acquaintance will always treasure fond memories of his rich and exuberant humanity.

R. S. T. C.

THE WAR AND THE CONSTITUTION

PART II

A MATTER of vital importance for the life of the civilian population was the passing of the Emergency Powers (Defence) Act, 1939. The measure is significant in the amplitude of power conferred to provide by Order in Council for securing the public safety, the defence of the realm, the maintenance of public order and the effective prosecution of war, and for the maintenance of supplies and services essential to the life of the community. Even more striking is the power given to authorise such persons as may be prescribed to make orders, rules, and byelaws for any purpose for which regulations may be made by Order in Council. Moreover, any regulation, order, rule or byelaw shall take effect notwithstanding the fact that it is inconsistent with any Act, or instrument having validity under any Act, other than the Emergency Powers (Defence) Act itself. The problem of inconsistency of these various forms of subordinate legislation *inter se* is thus shirked; presumably a regulation would be deemed of higher validity than an order, rule, or byelaw.

The safeguards limiting the use of these forms of legislation are restricted to forbidding any form of compulsory military, naval, or air force service or any form of industrial conscription, or the subjecting to trial by court martial of any person not subject to the Naval Discipline Act, military law, or the Air Force Act. Special provision, however, is made regarding charges, which must be deemed as limiting in this regard the generality of legislative power. Defence regulations, not, therefore, other forms, may authorise the making of a charge up to five pounds for licence, permit, certificate or other document for the purpose of the regulations, and of charges in respect of services rendered by the Crown, other than services necessary for the performance of duties imposed by law on the Crown. This power would doubtless cover services rendered by way of protection to shipping beyond those covered by the general duty of protection.[1] The case of charges in connection with control schemes under defence regulations is specially provided for. A Treasury order is requisite, and it must be expressly affirmed by a resolution of the Commons within 28 days after the making of the order, disregarding as usual any period of prorogation, dissolution or adjournment for more than four days. There is no doubt of the wisdom of this procedure, apart from the fact that otherwise the levying of a

[1] *China Navigation Co.* v. *Att. Gen.*, [1932] 2 K.B. 197.

contribution might be called into question as in *Att. Gen.* v. *Wilts United Dairies*.[2]

A nominal rather than a real safeguard is afforded by the rule that Orders in Council under the Act, but not other forms of legislation, must be laid before both Houses and may be annulled by either within 28 sitting days after laying. It was patently impossible for the Houses to consider effectively the regulations enacted on 25th August, 1939, with their numerous and onerous provisions. Moreover, the power to annul the Orders in Council was utterly unsuitable for use. There was much that was essential in the regulations and only certain portions were open to objection, and even then amendment was the remedy required, not repeal.

Nothing, however, is more remarkable than the acceptance[3] accorded by Parliament to the provisions of regulation 22 which contained provisions natural under a totalitarian régime, but almost inexcusable in a country which respects freedom, and which claimed to have taken up arms in order to vindicate liberty. Under this regulation it is legitimate, under the authority of the Minister of Health, to serve a notice on the occupier of any premises requiring such person to provide lodging, food, and attendance for specified persons. There is provided a penalty which may be up to £50 fine or three months imprisonment for any person who fails to comply with such a notice. There is allowed as a safeguard the right to complain to a tribunal set up by the Minister of Health in respect either of the service of a billeting notice or the operation of such a notice.

This regulation was used to compel householders in England and Scotland alike to take charge of children evacuated from towns held to be in vulnerable areas. Threats of compulsion were freely used to force acceptance, and in many cases elderly women were coerced into taking charge of children who on arrival were found to be suffering from disease, filthy, and barely clothed in garments which had on sanitary grounds to be destroyed.[4] In many cases serious suffering was thus inflicted, and it was in the extreme fortunate that large numbers of the parents whose children had been evacuated recalled them, when asked to contribute even nominal sums towards their support. In cases where women were evacuated with children under age five the position was even worse, but most of these women speedily returned to their husbands, whom they had been encouraged by the Ministry to leave to fend for themselves with disastrous physical and

[2] (1922) 91 L.J. K.B. 897.

[3] The idea that with war in Poland Germany could bomb Britain on a wide scale seemed incredible.

[4] See e.g. 351 H.C. Deb. 5 s. 824 ff.; *cf.* 710, 802 ff., 809 ff., 1259 ff., 2104 ff.

moral results. No more inexcusable violation of personal liberty than this turning of householders into servants in charge of children can well be imagined, though many householders with exemplary self-sacrifice tended those thrust upon them, spending freely from their own resources on the maintenance and clothing of the children. The deepness of the resentment of this policy can be seen from the facts of the reception of the revised evacuation proposals in 1940. The new scheme had merits; the folly of evacuation before a single air attack had been made on the civilian population was not to be repeated, for evacuation was to take place only if there were repeated and severe attacks. Promises were made that the scandal of the despatch of filthy and diseased children would not be repeated, and more adequate scales of payment were to be made. In Scotland several of the County Councils pointed out[5] to the government that private billeting would be intolerable, and requests for offers to accept children, coupled with threats of compulsion, elicited scarcely any replies,[6] while requests by parents for evacuation represented only small fractions of the children affected. Many parents had in September, 1939, acted hastily under the impression that evacuation was compulsory, and they had realised the violation of personal duty involved in forcing their children on others, and the strong objections to placing on the resources of the state the burden of whole or part maintenance of their children. It must be added that for many months the London County Council in a mistaken effort to compel evacuation set a bad example to other education authorities by reluctance to afford any educational facilities to children whose parents kept them in evacuation areas, and it was only tardily that the Board of Education realised the cruel injustice thus inflicted on those classes of the population who relied on education provided by local authorities. In April compulsory attendance was at last widely restored, but full-time attendance is far from universal. Great harm has been done.

Efforts have been made by reducing the normal holiday periods to make good the loss of education, but how deeply the deplorable policy adopted in the early months has injured willingness to learn and desire of parents to have children educated is illustrated by the fact that only 11 per cent of the senior pupils in Glasgow[7] took advantage of the opening of the schools in the holiday period

[5] In several cases school teachers refused again to act as billeting officers if compulsion were to be used.

[6] In many places under one per cent of householders was ready to take children.

[7] The figures for London were not much better and incalculable mischief has been done.

to enable them to make up for the time lost earlier, and in the Roman Catholic schools only 24 per cent of all pupils consented to attend. The folly of the first evacuation is further emphasised by the fact that many thousands of evacuated children had to be removed from the places whither they had been sent, on the score that these areas were open to enemy attack, while, though children were evacuated from London, refugee women and children from Gibraltar were evacuated to London.

The inability of ministers, themselves immune from inconvenience, and of judges to understand the evil character of the legislation was shown in the prosecution[8] of Mrs. Toone before the East Norton, Leicestershire, justices, for her refusal to accept into her house, and care for, two children then in quarantine, after having suffered from diphtheria. Mrs. Toone was the wife of the driver of an omnibus which daily carried school children, and the impropriety of the billeting notice thus was patent. Mrs. Toone appealed to the tribunal, but, before her appeal could be heard, she was prosecuted before the justices, who took the reasonable view that the regulations should not be read as compelling obedience to a notice before the tribunal had considered the case. On appeal to the King's Bench it was ruled that a notice must be complied with. Hawke, J., admitted that great hardship might result, but what was being considered was not the good of the individual, but that of the population as a whole. Charles, J., admitted there might be hard and difficult cases, but the object of the regulations was to secure the safety of tens of thousands of evacuated children. Against this complacency may be set countless incidents[9] such as the protest of the Kirkmichael (Perthshire) and District School Management Committee, which pointed out that in some cases the mental strain imposed on women householders had had such injurious effects on health that they had not yet recovered, while damage to household goods had involved a dead loss to people who could ill afford it. The injury done to children in reception areas, whose parents were compelled to care for evacuated children, was often very great; extreme bitterness between the people of the country and of the towns was often generated and acceptance of the war as a national aim was seriously affected. To violate the elementary rights of home life in order to attempt to create liberty in Europe was a wrong which Parliament should not have allowed to occur; had it continued in full force, a powerful anti-war movement must have spread far and wide. Moreover, the policy was severely

[8] [1940] 1 K.B. 638.
[9] Several cases of suicide are recorded in England and Scotland.

condemned for its effects on agriculture. At a time when demands were being made for the great extension of cultivation and the fullest production of all kinds of produce, the time and strength of the women in country districts were distracted for the purpose of caring for children from evacuation areas, whose mothers were left free from their natural duty. It is not surprising that full use of the scheme was made by many parents living on unemployment and public assistance grants.

Grave as was the effect on public morale of the evacuation of children within the United Kingdom, much greater harm was done by evacuation of children and in some cases adults overseas, a practice resorted to not merely by university teachers, but also by ministers, members of Parliament and high defence officers. It was obvious that those who thus acted had grave doubts as to the efficiency of British defence, and there was naturally much resentment that the wealthier classes should thus be able to extricate their families from the common danger while the poorer classes were compelled to allow their dependants to run the risk of staying in their own country. A limited scheme of assisted emigration for poorer children involves unfair discrimination and unduly high costs for a small section of the population.

Effective means of silencing criticism of the regulations was afforded by regulation 39B, added on the outbreak of war,[10] which made it illegal to endeavour to influence any section of public opinion (whether in the United Kingdom or elsewhere) in a manner likely to be prejudicial to the defence of the realm or the efficient prosecution of the war. It was wholly impossible to say what this wide power meant. Was it legitimate to denounce compulsory billeting as a violation of fundamental right, and to urge those on whom evacuated persons were being forced to stand up against billeting notices? Was it legitimate to urge that any opportunity of holding a peace discussion should be welcomed, even if it were not possible to secure the condition of the withdrawal of German forces from Poland deemed essential by Britain and France, when the chance of an armistice on the basis of the *status quo* was suggested by the activity of Signor Mussolini immediately after the outbreak of the war? Threats of action against pacifist societies were freely made by police authorities, and patently it might prove very difficult to escape conviction under so wide a rule. Moreover, the Secretary of State was given unfettered discretion to restrict or prevent the publication in the United Kingdom of matters as to which he was satisfied that the publication or the unrestricted publication might be prejudicial

[10] S.R.O., 1939, No. 978, 1st September.

to the defence of the realm or the efficient prosecution of war. This clearly permitted the suppression of unpopular minority views.

Very wide powers were given to the Secretary of State to deal with any person with a view to preventing him acting in any manner prejudicial to the public safety or the defence of the realm. He might prohibit or restrict his use of any specified articles; impose restrictions in respect of employment, association with other persons, or dissemination of news or propaganda; or order detention. No legal trial was permitted, though cases might be considered by an Advisory Committee. There was a wide prohibition of endeavours to cause disaffection among any persons engaged (whether in the United Kingdom or elsewhere) in His Majesty's service, a provision objectionable in the vagueness of the term 'disaffection,' which might cover discontent with the conditions of employment or remuneration. Powers to prohibit public meetings were not merely given to the Secretary of State, but he was authorised to delegate authority to any mayor, justice of the peace, or chief police officer. Power was also given to the Secretary of State to forbid in any area any person to be out of doors between specified hours except under authority of a permit. There was a wide prohibition of sabotage, which might be held to apply to workers who by striking impeded the movement of a vessel or vehicle.

Knowledge of these provisions took some time to spread among the public, largely no doubt because the new rules were added to the main body by a fresh Order in Council. But the Liberal party seized the opportunity to protest on October 31, urging annulment of the Order in Council of September 1. The discussion revealed Conservatives among the opponents of the regulations impugned, and the Secretary of State was not altogether happy in his laboured defence of the rules. A rather pointless form of pro-Nazi propaganda was alleged, which aimed at spreading rumours against the evacuation measures, and inducing those concerned to return to London,[11] when an air attack might bring the Jews to their knees. In point of fact the rapid return of evacuees was not induced by propaganda, but by the obvious ineptitude of the scheme, and the minister was pointedly reminded by Dr. Edith Summerskill that he was no longer dealing with Bengalis. Fortunately Sir S. Hoare[12] extricated his colleague and the ministry from an impossible position by promising reconsideration, and accepting the aid of members of the Commons in

[11] The governmental evacuation policy began to break down almost at once.
[12] The advantage of experience in the Commons is always very great.

framing a new set of regulations, which would be enacted by Order in Council, and thus be open to further discussion in the Commons.

The value of consideration in this manner was plainly shown when the regulations were re-presented.[13] Curiously enough the curfew order was allowed to stand, on the plea that it would be convenient that the minister should have power to deal with a condition of confusion arising from a disastrous air attack; otherwise the local authority would probably have to issue orders, which would better emanate from a minister of the Crown. The majority of the representative committee which considered the regulations turned out to favour its retention as available in grave emergency. But vital changes were made in the control of opinion. An endeavour to influence public opinion in a manner prejudicial to the defence of the realm or the efficient prosecution of war was permitted, unless use was made of false statements, false documents, or false reports, and it is now a defence to show reasonable cause to believe that the statement, document, or report was true. Censorship of publication in the United Kingdom is restricted to matters prejudicial to the relations between the United Kingdom and other countries or to transactions in progress or proposed between the Government of the United Kingdom and persons in any other country. There is, undoubtedly, a grave vagueness in the provision, but it is far superior to the original. Similarly the taking away from the Secretary of State of power to delegate the right to prohibit meetings was a real improvement.

Personal liberty was to some extent safeguarded by the limitation of the power of detention to persons of hostile origin or associations, and to persons whom the Secretary of State had reasonable cause to believe to have been recently concerned in acts prejudicial to the public safety or the defence of the realm, or in the preparation or instigation of such acts. The first category of persons accords with the rules of 1914,[14] and its reasonableness cannot be seriously questioned. The second category covers a new class of cases arising out of the activities of the Irish Republican Army and its sympathisers. Any person detained may make representations against detention, and is to be supplied by the Advisory Committee, before which he appears, with such particulars of the cause of his detention as the chairman thinks necessary to enable him to present his defence. The House of Commons will be able to note the relation between the action of the Secretary

[13] S.R. & O., 1939, No. 1681.
[14] *Cf. R.* v. *Halliday; Zadig, Ex parte*, [1917] A.C. 260.

of State and the recommendations of the Advisory Committees from a monthly return to Parliament; so far he has accepted all recommendations. In fact the tendency of public opinion soon turned in the direction of holding that undue lenity rather than severity has been manifested towards persons of hostile origin or connections. The situation has been greatly changed since the Great War by reason of the fact of the presence in Britain of large numbers of German and other refugees,[15] a considerable number of whom are genuinely hostile to the Nazi régime, while others may be in fact Nazi emissaries sent to acquire information useful to the enemy.

An interesting issue regarding internment of British subjects was raised through the internment of Captain Ramsay, M.P., and the subsequent refusal of the Secretary of State, in concurrence with the view of the advisory committee, to order release. Some hardship was thus inflicted upon his constituents, who naturally pressed that he should either be found guilty of illegal action by a Court, in which case his membership of the Commons might be terminated either by operation of law or by expulsion, or he should be acquitted, so as to be able to represent the views of his constituents. A further point raised was referred to the Committee of Privileges, in order to decide whether such detention was a violation of Parliamentary privilege. *Prima facie* the action taken could not thus be regarded, but the case stressed the objections to imprisonment by executive order, and posed the question whether the common law, the law of treason, the regulations made under the Emergency Powers (Defence) Acts, and the Treachery Act, 1940, were not sufficient to cover all cases, trial *in camera* being where necessary resorted to.

In *Ex parte Lees*[16] the claim was made that the true interpretation of *R.* v. *Halliday*[17] authorised the conclusion that, if it could be shown that the facts on which the detention order was made did not exist, the order was invalid, and the subject was entitled to his liberty. It is difficult to accept this contention as consistent with the case in question. Mr. Lees was detained under an extension of regulation 18B, Captain Ramsay under the original regulation.

There has been a useful limitation in the ambit of the offence of causing disaffection. The defence is now 'to seduce from their duty' or 'to cause disaffection likely to lead to breaches

[15] The misuse of permission to send remittances to neutral countries, in order to help relatives in Germany, was found to be serious; *The Times*, 17th April, 1940.

[16] *The Times*, August 13th, 1940; regulation 18B (1A), S.R. & O. No. 770.

[17] [1917] A.C. 260.

of their duty' among persons in His Majesty's service, or engaged under any public authority in performance of functions in connection with the defence of the realm or the securing of the public safety. The offence of sabotage is not involved in taking part in or peacefully persuading any person to take part in a strike. There is also a restriction on the power of arrest without warrant, and on the use of photographs taken under the powers given in the regulation; such photographs and other documents relating to measurement or identification must be destroyed, if no conviction is recorded, as soon as may be after the expiration of the Emergency Powers (Defence) Act, 1939. It is clear that, despite the modifications made by the new Order in Council, the powers which are vested in the ministry are still capable of much misuse. The failure to restrict the powers of billeting is only one of the most obvious modes in which grievous wrong can be inflicted without sufficient opportunity of redress.

The same feature of the possibility, or certainty, of misuse can be seen in other spheres. The system of food rationing, which has worked with singular absence of efficiency, contains a provision under which consumers are compelled to deal only with a selected retailer and are permitted to make a change only at the close of a rationing period of twenty-six weeks. It is possible to defend, though Sir A. Sinclair doubted, the principle of not allowing change at will, but the refusal to allow change except with the arbitrary assent of the local food office is clearly a foolish interference with legitimate liberty, provocative, like similar interferences, of the reflection that the ministry's contribution to the liberation of Europe is confined to the destruction of the liberties of the British people.

There has also been much ground for complaint in the operation of the censorship,[18] both in its compulsory aspect, affecting communications for overseas, and in its voluntary aspect. In the former the opportunity has been taken to prevent the despatch overseas of matter disagreeing with the views of the ministry on issues unconnected with war operations or diplomacy, such as the constitutional strife in India. In the latter an excision of 44 lines from a newspaper article by Mr. Hore-Belisha after his resignation of office, urging aid for Finland, was hardly prudent. But the danger of suppression of opinion was strikingly illustrated by the demand by Lord Denman in the House of Lords on 24th January for careful censorship of news films in war-time. His

[18] The seizure by the police on 11–12th September, of papers reporting the arrival of the B.E.F. in France had to be lamely excused; 351 H.C. Deb. 5 s. 664 ff., 686 f., 969 f.

claim was based on a film depicting the return of Miss Unity Mitford, whose restoration to England was facilitated, for reasons unexplained, by the British Government, but was not received with any enthusiasm by the public, and the resignation of Mr. Hore-Belisha. The government fortunately declined the suggestion of Lord Denman, though Lord Dufferin and Ava's condemnation of the Mitford film was expressed with ludicrous violence, suggesting the necessity of constant vigilance to preserve the right of expression of public opinion against persons whose preference of Nazi doctrines to those of their own country is openly avowed.

Eloquent testimony to the importance of freedom of criticism in Parliament was borne by Mr. Wedgwood Benn on 21st November 1939, on the discussion of the report of the Select Committee[19] appointed to inquire into the applicability of the Official Secrets Acts to members of the House in the discharge of their Parliamentary duties, having regard to the undoubted privileges of the House as confirmed in the Bill of Rights. The report left matters largely in *statu quo*, reaffirming the absolute freedom of members as regards statements in the House of Commons, but it negatived any special privilege of members regarding the asking for or accepting information from members of the services contrary to their legal obligations. Mr. Benn, in supporting the Premier's proposal to accept the report, stressed the special value in time of war of the activity of the Commons especially in the appeal to world opinion, in securing the due equipment of the forces, and in maintaining the public morale. Freedom from interference by defence regulations or the Official Secrets Acts was of special advantage, while the amazing speed and effectiveness of the Parliamentary machinery was exemplified by the swift passage of all necessary acts. Contemporaneously, the Official Secrets Act of 1920 was amended[20] to make it clear that the right of interrogation thereby given was confined to cases virtually of espionage, and could normally be exercised only with the assent of the Home Secretary, though a chief officer of police might act in emergency, and in any case police only and not members of the forces could interrogate.

The importance of due publicity of debate was accepted on all hands, and the ministry showed much reluctance to accept suggestions of holding secret sessions, on the ground that the impression would thus be given currency that there were serious matters to hide. When on 13th December, 1939, a secret session

[19] H.C. Paper, 1938–39, No. 101.
[20] 2 & 3 Geo. VI, c. 121.

was conceded, it was made clear by the Speaker that any member who disclosed, even in private conversation, what transpired would be wilfully disobeying the orders of the House and would be committing a gross breach of privilege, and an Order in Council forbade publication in any form of any account of such a session in either House, except such report as might be communicated through the press and censorship bureau. The fidelity with which secrecy was preserved was remarkable; an alleged version published in a foreign newspaper was patently fictitious. The ministry's argument that any representations which members may desire to make, but do not wish to air in public, can always be communicated to ministers is not wholly satisfactory, for discussion in secrecy in the House might have the advantage of forcing ministers to make concessions which they would refuse to mere private representations.[21] Further the frequency of French secret sessions has some force as an argument for wider British use. It was in fact arranged to have a secret session on economic warfare in April, but it was rendered inopportune at the moment by the seizure by Germany of Denmark and Norway.

But there is obvious risk in the frequent resort to secret sessions and the reaction against them was noted in the Commons on July 30, when Mr. Churchill, while professing readiness to leave the issue open, practically urged the house to sit in secret, though the Under Secretary for Foreign Affairs had come down with a longer statement for a public debate as well as a fuller account for a secret session. Earl Winterton and Colonel Wedgwood protested, and in fact the Commons fails in its vital duty of enlightening the public when it sits in secret. The use of secret sessions in France, it is argued, aided in the débâcle, because, taken in conjunction with the strict censorship, it secured that the people were ignorant of the true character of the dangers to be faced.

A rather unfortunate impression was created on August 16th on the claim of Mr. Churchill that he could have prevented, not merely any reference in the press to inquiries regarding the Swinton Committee on Fifth Column Activities, but also the appearance of questions on the notice paper of the Commons. This was a dangerous claim, and Mr. A. Hopkinson protested that the only questions which could be refused by the Speaker, or censored by the Premier, were such as conveyed information deleterious to the public interest. The minister might refuse, of course, to answer, but that was a different thing. Mr. Churchill showed exaggerated indignation; he claimed that the House on

[21] *Cf.* 351 H.C. Deb. 5 s. 674 f., 993 f., 1254 f., 1873 ff.

principle did not interfere in matters of secret service, but, while this was conceded, it was patently absurd to refuse to give the salaries paid to two members, after mentioning that Lord Swinton and another member were working gratuitously. No doubt allowance must be paid for the great pressure of the war on the judgment of the Prime Minister; otherwise he would have realised that his erroneous insistence on secrecy merely excited rumours, doubtless unfounded, regarding the character of Fifth Column activities, and disturbed public opinion, already somewhat perturbed by his rash pledge to secure the "full restoration of the independence and greatness of France."

The deterioration of the position in Europe resulted in serious inroads on freedom of criticism. On May 9th the Secretary of State announced the decision to distinguish between the mere expression of honest opinion and the systematic advocacy of anti-war policies with intent to weaken the national resolution to prosecute the war to a successful conclusion. A complex plan of dealing with the evil[22] was devised under which, if a warning was given by the Secretary of State, to a person concerned in the systematic publication of matter calculated to foment opposition to the successful prosecution of the war, that person if he published later such matter might be punished with penal servitude up to seven years or fine up to £500 or both. It is a defence to show that there was no intention to foment opposition and no reasonable cause to believe that the matter published was calculated to do so. There is obviously much objection to the complete discretion given to the minister as regards warnings, and the inability of the person warned to secure a judicial declaration on the subject of the alleged publication. The normal procedure would seem to be to create the offence of systematic publication of matter calculated to foment opposition, and to leave the matter to the courts. But when this complex procedure was recognised as ineffective, the plan adopted[23] was the making on May 29th of a regulation under which the Secretary of State may forbid the printing, publishing, or distribution of any newspaper in which there is a systematic publication of matter calculated to foment opposition to the prosecution of the war. Under both the earlier and the new regulation there is provision for the seizure of printing presses used in connection with matters forbidden, but the High Court may release the press or order destruction or forfeiture. There is provision against the substitution of a newspaper with change of name or the use of another press.

[22] S.R. & O. No. 680 (regulation 2 C).
[23] S.R. & O. No. 828 (regulation 2 D).

An interesting measure of protection for publication of unpopular opinions was afforded by Stable, J., in the libel claim of Sir W. Citrine and other trade union leaders against the *British Worker*.[24] He found that the libels were clear and without excuse, but he limited the damages on the score that it was not desirable to award a sum which might prevent the public reading the paper or contributing their views to it, provided it refrained from libelling people of different views. The question, however, obtrudes itself, whether justice does not require that persons unfairly defamed should be awarded full damages, even if the result is indirectly to hamper the efforts of a newspaper to damage the British cause by inciting workers to believe that, in aiding in the effective conduct of the war, their leaders are betraying trade union interests. Foreign subsidisation of the paper was not established but not disproved, but that the paper took its policy ultimately from M. Stalin was patent.

Another drastic interference with expression of opinion was provided on June 11th,[25] when it was made an offence to publish any report or statement relating to matters connected with the war which is likely to cause alarm or despondency. The accused could escape conviction by proving reasonable cause to believe that the report or statement was true, and that the publication was not malicious and ought fairly to be excused. As the jurisdiction was made summary, a considerable number of unwise prosecutions took place, with the result that the Prime Minister on July 23rd felt it wise to undertake that the Secretary of State would review the penalties inflicted. This wholesale exercise of the prerogative of mercy is interesting; it showed a good many excessive terms of imprisonment and fines. At the same time Mr. Churchill consigned to innocuous desuetude a deplorable effort of the Ministry of Information to justify its excessive cost by urging the creation of a "Silent Column," and asking people not to talk about air raids even if they happened in their own presence. The natural result was the wholesale dissemination of rumours of ghastly disasters which the government wished to suppress. The complete ignorance of the psychology of the people revealed did much to destroy what little confidence the public had in a ministry, whose personnel was constantly being changed in the highest ranks.

On the other hand, there was general acceptance of the necessity of the Treachery Act, 1940,[26] which provides the death

[24] *The Times*, May 7th, 1940.
[25] S.R. & O. No. 938 (regulation 39 BA).
[26] 3 & 4 Geo. VI, c. 21.

penalty for any person who, with intent to help the enemy, does, or attempts or conspires with any other person to do, any act which is designed or likely to give assistance to the naval, military or air operations of the enemy, to impede such operations of His Majesty's forces, or to endanger life. An enemy alien may be dealt with by court martial, if the Attorney-General so directs. The offences in question are doubtless treason, but it is preferable to have this simple Act. A member of the British or foreign armed forces, if sentenced to death by hanging, may be directed by the Secretary of State to be shot instead.

Wide as were the powers given by the Emergency Powers (Defence) Act, 1939, it was felt necessary to extend them by removing the limits thereby set on the power to make regulations. The Emergency Powers (Defence) Act, 1940,[27] therefore authorised the making by Order in Council of defence regulations requiring persons to place themselves, their services, and their property at the disposal of His Majesty for securing the public safety, the defence of the realm, the maintenance of public order, the efficient prosecution of any war, or the maintenance of supplies or services essential to the life of the community. The value of the extension of powers is clear, for all restrictions on the exercise of the powers included in the earlier Act are omitted. An interesting example of the traditional tendency of our courts to protect property rights, even where conflicting with the public interest, was seen in the decision on the Act of 1939 of Bennett, J., in *E. H. Jones (Machine Tools) Ltd.* v. *Farrell and Muirsmith*,[28] where he held that the power to make regulations authorising the taking possession or control of any property or undertaking on behalf of His Majesty did not authorise the Minister of Supply, acting under regulation 55 (4), to appoint the defendants to carry on the business of the company, with power as agents of the undertaking to conduct the business independently of the company, and to ignore the limits imposed by its constitution on the company. The decision is not beyond criticism, but no appeal was brought, as the simpler course was adopted of framing a new regulation under the powers of both Acts. Under this regulation an Order may be made requiring the management to act as directed by a controller appointed by the Minister, but, unless otherwise provided in the Order, the controller may not give directions ignoring the limits on the company's powers under its constitution. It is also an improvement that in the Order actually made the controller does not appear as an agent of the company, but acts on behalf of the

[27] 3 & 4 Geo. VI, c. 20.
[28] *The Times*, August 3rd, 1940.

Crown as specified in the Act of 1940. It is curious but characteristic that individual liberty is less vigilantly protected by the courts than property rights.

The position of members of the Commons who hold, as members of any of His Majesty's forces, any office or place of profit under the Crown was made clear by the House of Commons (Service in His Majesty's Forces) Act, 1939. The Attorney-General was not precisely as lucid as usual in setting forth why the Act was deemed necessary; *prima facie* it should simply have been held that such offices were covered as old offices, and the incapacity attaching to new offices under the Succession to the Crown Act, 1707, could not apply. Still, as officers of the Royal Air Force and of the Territorial and Reserve Forces are specifically provided for, it was certainly worth while passing the enactment to remove all difficulties. The question of the grant of leave and of travelling facilities to officers in order to attend meetings of the House was raised,[29] and left as was proper to the good sense of officers and their superiors. Patently, while no obstacle should be placed in the way of the performance of his Parliamentary duties by any officer, he could not be retained in service if absence rendered his performance of his service duties ineffective.

The question of unpaid service by members in civil capacities was raised on 13th September in respect of refusals of the Foreign Office to accept such offers. It was explained that, in the view of the Prime Minister, the dual position which would result might give rise to a conflict of responsibility which might be embarrassing to all concerned.[30] An interesting plea for use of members' services in connection with ministries was made by Colonel Wedgwood,[31] who pointed out that officers in the Great War were used by generals to convey their views to the government, quite illegally and quite secretly, but very usefully. No great enthusiasm for this line of reasoning was displayed by the ministry; criticism by those with contemporaneous knowledge of departmental issues would be embarrassing. On the other hand, no exception[32] was taken to the utilisation of the services of members as Regional Commissioners, even if paid, and the Regional Commissioners Act, 1939, therefore rendered that office compatible with the holding of a seat in Parliament. These officers, who were established with much flourish of trumpets,

[29] 351 H.C. Deb. 5 s. 1184 f.

[30] On 20th September a rather less absolute negative was returned by the Prime Minister; *ibid.*, 943.

[31] *Ibid.*, 699 f.

[32] Mr. McGovern quite fairly pointed out the difficulty of the position of an opposition member in special in performing the duty of criticism of work coming under his notice; 351 H.C. Deb. 5 s. 1193 f.; *cf.* 875 f.

were created under the impression that, in the event of a breakdown in communications between the central government and the regions into which the country was duly divided, they would exercise the functions vested in His Majesty's Government, in consultation with the regional representatives of government departments, until communications had been satisfactorily established.[33] In the interim they have no control over local bodies, and it may be feared that their appointment has not raised much enthusiasm locally. There can be no doubt that at first their office was unwisely magnified, the Home Secretary laying it down that the Commissioners had full discretion as to the grant of facilities for the admission of members of Parliament to discuss issues with these super-men, but on pressure by Sir Archibald Sinclair he admitted that a member stood in the same relation to a Commissioner as to a Government Department, so that their Olympian detachment is not to be absolute.[34] In fact, of course, unless and until communications are severed, the Commissioners have no real work to do, save in so far as they use tactful encouragement to expedite and complete preparations for civil defence, which, it must be added, has so far been conducted with the maximum expenditure. Reduction has at long last been induced by public opinion, for voluntary service has been seriously discouraged by evidence of favouritism, waste and extravagance.

The same general inclination of a ministry in war to spend money recklessly has been recognised by the creation on December 12 of a Select Committee of 28 members to examine the current expenditure defrayed out of moneys provided by Parliament for the defence services, for civil defence, and for other services directly connected with the war, and to report what if any economies consistent with the policy decided by the government may be effected therein. The Committee can divide itself into groups to deal with special topics, but it is not asked to review social expenditure, and no doubt it has sufficient to do with its war task. Its reports show serious waste of public funds.

In the case of local government a fundamental decision was early adopted and made effective by the Local Elections and Register of Electors (Temporary Provisions) Act, 1939,[35] for the period to the end of 1940, on the understanding that the date will be advanced from time to time as during the Great War. Local elections are thus suspended, and are intended to be in

[33] 351 H.C. Deb. 5 s. 644 f.
[34] *Ibid.*, 1482 f.
[35] 2 & 3 Geo. VI, c. 115.

abeyance until the close of the war. It is very far from easy to see adequate justification for the proposal, for in fact the essential nature of local elections renders the existence of war by no means a very serious obstacle to their being held and resulting quite satisfactorily. There are always a fair proportion of members, who might be superseded by others younger or more useful. The decision seems to have been arrived at under the influence of the expectation of devastating air attacks on the great cities, which prompted the evacuation from London of large numbers of civil servants at great cost and with considerable hardship and undoubted loss of efficiency. But the passage of the measure was facilitated by the fact that vast numbers of local government electors do not take any interest in the elections, and were totally unconcerned whether an election was held or not.

A minor change was the authority given by the Local Government Staffs (War Service) Act, 1939,[36] which permits local authorities to imitate the practice of the government in making up to their employees who undertake war service, including civil defence services, the difference between their emoluments in that service and their civil pay. The Act had to be made permissive as in the Great War, for it was impossible to compel local authorities to place on the ratepayers the burden of differential treatment of their servants, when many ratepayers might be seriously affected by the war. Efforts to secure abandonment of the permissive principle were made in Parliament but not pressed, and a considerable discrepancy in practice exists between local authorities, even when their circumstances are generally speaking virtually the same. The claim, however, put forward in Scotland that pressure ought to be applied to education authorities to compel full making up of emoluments has been rejected by the ministry, which has stressed the right of each authority to take all relevant factors into consideration in each case.

For the administration of justice certain provisions of interest were made.[37] The most important in practice at present is the reduction of criminal juries to seven, a majority verdict being available as usual in Scotland, but the majority must number five, a useful precaution. The rule that civil juries will be allowed only where the court deems such action essential is in accord with the modern tendency to limit the use of the jury in civil causes; opinion must differ whether the policy is wise; no doubt under existing conditions it has not been proved essential. It is

[36] 2 & 3 Geo. VI, c. 94.

[37] Administration of Justice (Emergency Provisions) Act, 1939 (2 & 3 Geo. VI, c. 78).

interesting that the Lord Chancellor's action has been substituted for Order in Council as the method bringing commissioners of assize into being. That is a simplification which may easily persist after the present emergency has disappeared. It may be hoped that the powers of decentralisation of courts given to the Lord Chancellor may not be required to be used, but it is interesting to note that normally in the use of most of his emergency powers the Lord Chancellor requires the concurrence of two other judges, unless in exceptional circumstances they are not available.

An interesting innovation was caused by the imminent danger of invasion or of widespread confusion arising from severe attacks from the air. Obviously in the confusion thence resulting crimes might be committed which would demand immediate repression, and the military authorities might have to exercise their common law powers, or as they may be called martial law. But equally obviously it was undesirable that they should act thus, if it could be avoided, in grave matters, and, with the assent of the military authorities, it was decided as far as possible to use courts of a civil character for immediate punishment of crimes committed in such circumstances of confusion. This necessitated the amendment of the Emergency Powers (Defence) Act, 1939, by giving power[38] to make provision for securing that, where by reason of recent or immediately apprehended enemy action the military situation is such as to require that criminal justice should be administered more speedily than would be practicable by the ordinary courts, persons, whether or not subject to the Naval Discipline Act, to military law, or to the Air Force Act, may, in such circumstances as may be provided by the regulations, be tried by special courts, not being courts martial. The intention of the government is that the courts shall be constituted of a single judge, sitting with two justices of the peace as assessors to give local knowledge, but deciding on his own judgment. It was desired by the Secretary of State that the decisions of these courts should be final, subject to the prerogative of pardon, and he contended obstinately against any appeal, though he was willing to give assurances that all death sentences would be specially considered by himself. The Commons, however, reacted strongly to this intransigeant refusal, and the Act was only allowed to pass after it was amended to require that each sentence of death should be reviewed by not less than three persons holding or having held high judicial office; other cases where review is required are left to be determined by regulations. These tribunals will deal with all crimes, including those created by regulations, e.g. that of

[38] Emergency Powers (Defence) (No. 2) Act, 1940 (3 & 4 Geo. VI, c. 45).

looting or overpowering sentries. It will of course be necessary to prescribe from time to time the areas wherein the courts shall function. There is obviously a difficulty as to the extent to which by the creation of such courts the common law rights of the military authorities to repress action endangering the public safety may be restricted on the analogy of *Attorney-General* v. *De Keyser's Royal Hotel*,[39] but it is probable that no serious trouble will arise. For the control of the civil population in the event of invasion the military authorities have common law powers, and the Regional Commissioners have been given various authorities under the Emergency Powers (Defence) Acts, 1939–1940. Pending invasion, evacuation of certain areas has been enforced, and entry into menaced districts has been restricted to those with substantial reasons for their entry.

The issue of aliens created new difficulties as opposed to those in the Great War, because there were in the country large numbers of natives of Czechoslovakia whose country had been virtually subjugated by Germany. These persons were, it was ruled,[40] not to be treated automatically as enemy aliens. In the case of Germans and Austrians, while they must be recognised as enemy aliens, efforts would be made to discriminate between refugees genuinely well affected to the country wherein they had found protection, and others. Their treatment varies between freedom, restrictions on residence, travel and possession of such things capable of misuse as cameras and motor cars, and internment; so far as practicable every effort is made by use of advisory tribunals to accomplish the two purposes, of safeguarding the state and maintaining generous treatment of the individual. It must be remembered that in France some anxiety had been evinced regarding the fact that there are in Britain over 70,000 natives of Greater Germany, and that deliberate breach of conditions of permission to reside by a young alien, who had been vouched for by excellent authority, caused a wide demand for greater precautions. Moreover, it was found necessary to define certain areas, with important ports, wherein the residence of any alien could be allowed only by permit. Further, the landing of foreign seamen had to be drastically restrained, but Norwegians were accorded relief after the entry of Norway into the war following the German attack on April 9. The position of enemy aliens was rendered much more difficult by the revelation of the success of Fifth Column activities in the countries subjected by Germany, and wholesale internment of such aliens

[39] [1920] A.C. 508.
[40] Aliens Order in Council, 1st September, 1939; 351 H.C. Deb. 5 s. 367.

was hastily ordered, in deference to pressure by the military authorities who were being harassed by reports of signals being given to enemy aircraft, and in some measure to prevent them becoming objects of popular attack. It is uncertain whether the drastic action taken was wholly justified, and many cases were adduced in which refugees and other aliens wholly hostile to Germany had been subjected to internment under unsatisfactory conditions, though a prudent policy would have afforded them facilities to aid in securing victory. The pressure in the Commons at last induced a change of attitude, release being considered possible in certain categories of cases,[41] though even after that concession, there was much criticism of the governmental policy as harsh, unjust, and wasteful of man power. The obvious danger of the existence of large bodies of interned persons in the event of invasion was recognised, and arrangements were made to send large numbers to Canada and Australia for safe custody; a considerable number of these were lost through the sinking by German action of the *Arandora Star*. In August an Advisory Council on Aliens was appointed to assist the Foreign Office by advice on various aspects of the question, including the maintenance of the morale of aliens, while improvement in the very unsatisfactory conditions of the internment camps was assured by transfer to Home Office control in lieu of that of the War Office. As regards trading with the enemy[42] the definition of enemies followed that worked out in the Great War. The complaint was made that in that war the treatment of enemy property had resulted in much needless injury, but the President of the Board of Trade gave assurances that property vested in trustees would be administered with due care, pending ultimate decisions as to its final disposal.

The introduction of compulsory service resulted in the usual endeavour of youths of double nationality, British and neutral, especially in parts of Scotland Italians, to claim non-British nationality. But the right to do so under the British Nationality and Status of Aliens Act, 1914, applies only to a youth not already brought under the operation of the National Service (Armed Forces) Act, 1939, by the issue of a proclamation applying to him, the date of the proclamation being decisive under s. 1 (1) (*a*) of that Act.[43]

[41] Parl. Pap. Cmd. 6217. Striking criticisms by authoritative bodies are given in *The Times*, August 10th and 16th, 1940. For defence of action, see the Secretary of State, House of Commons, May 23rd, July 23rd.

[42] Trading with the Enemy Act, 1939 (2 & 3 Geo. VI, c. 89).

[43] *Vecht* v. *Taylor* (1917), 116 L.T. 446; *Dawson* v. *Meuli* (1918), 118 L.T. 357; *Gschwind* v. *Huntington*, [1918] 2 K.B. 420.

Two constitutional issues closely connected with international law fell to be solved. The presence of defence forces under foreign governments in exile, or under foreign authorities, such as General de Gaulle, recognised as competent to maintain naval, military or air forces for service in association with His Majesty's forces, necessitated definition of their position. There was available the analogy of the Visiting Forces (British Dominions) Act, 1933, and the Allied Forces Act, 1940, provides that those in control of the forces may impose discipline and carry out internal administration, while aid can be given by British authorities, power being given to apply the Naval Discipline Act, the Army Act, and the Air Force Act with adaptations. Steps had already been taken to bring into operation for the Dominion forces in Britain the system contemplated in the Act of 1933.[44]

The other point was the decision of the government as represented by the War Office and the Ministry of Home Security, to add to the forces of the Crown a Home Guard, trained and armed, but unpaid and composed of civilians giving up part of their time to defence activities, and to authorise the civil population to do what they could to protect themselves, their families, and their homes against small parties of the enemy moving about, threatening persons and property in an area not under enemy control. In the case of the Home Guard, which is under regular command, carries arms openly, observes the rules of war, and has a fixed emblem visible from a distance or a uniform, the Hague Convention regulating land warfare affords full status as legitimate belligerents,[45] the denials of this fact by the German press and broadcasts indicate intention to deny belligerent status, but have no legal basis. On the other hand, the authority given to private persons to resist does undoubtedly involve them in the danger of being treated as war criminals, and such action by Germany may be assumed as certain, should her forces secure the power so to act. This consideration strongly supports the argument of those who hold that all members of the community, who are trustworthy and capable to use firearms, should be provided with rifles if they so desire, or if they prefer with hand grenades. It may be added that, while women are not accepted for fighting purposes in the defence forces or Home Guard, they are included in the authority to resist enemy bands. In fact, surrenders of German airmen after landing by parachutes from disabled aircraft have been procured both by civilians and members of the Home

[44] S.R. & O. Nos. 1010–12, Army Order 256, 1939. See also Army and Air Force (Annual) Act, 1940, s. 3, for the validity of extraterritorial legislation of Australia and New Zealand.

[45] Wheaton, *International Law*, (ed. Keith), ii. 717 ff.

Guard. As the issue has been raised,[46] it should be noted that the royal recognition of the right of action by civilians clothes their actions with the immunity from civil or criminal jurisdiction due to acts of State, for it is certain that the killing by a civilian with authority from the Crown of an enemy invader on British territory can be justified in British courts as an act of State, as fully as killing by recognised forces such as the Home Guard.[47]

A. Berriedale Keith

[46] Lord Mottistone, *The Times*, June 18th, 1940.
[47] Keith, *The Constitution of England from Victoria to George VI*, ii, 363.

ON LAW REPORTING

THE majority Report of the Committee on Law Reporting is at once a deeply interesting and a wholly disappointing document.

The Committee consisted of the Hon. Mr. Justice Simonds (chairman), The Hon. Mr. Justice Wrottesley, Professor A. L. Goodhart, L. S. Holmes, Esq., His Honour Judge Trevor Hunter, K.C., C. T. Le Quesne, Esq., K.C., A. L. C. Macaskie, Esq., L.C., R. F. Roxburgh, Esq., L.C., J. H. Stamp, Esq., Professor P. H. Winfield, J. F. Woodthorpe, Esq., and Miss Barbara Sharp, Secretary. The Committee held ten meetings and heard a number of witnesses (their names are given at page 3 of the Report) and studied a number of memoranda that were submitted. At the end of twenty-two printed pages of the Majority Report the Committee say they "fear the sum of this somewhat long Report is negative. That there are inconveniences, to say the least, in the present state of affairs, we are not prepared to deny. But we cannot recommend any cure for them which would not bring greater evils in its train." And then, a little shamefacedly as it seems, they repeat some suggestions—

1. It is important that the general rule of exclusive citation of a Report in the Law Reports should be enforced.

2. The Committee is not satisfied that Reports in the Law Reports might not be speeded up.

3. There is a large margin for difference of opinion as to "reportable" cases. The Law Reports might take a more generous view of what is reportable.

4. The judges are advised to decline to allow a set of Reports to be cited (if any other Report is available) in cases in which it appears that the barrister making the Report abuses his right "by vouching the report with no further justification than that he has read a transcript of the judgment."

These suggestions have their value, to be sure. Yet, somehow, one expected more from a Committee so strongly constituted. The dissentient report of Professor Goodhart does in fact attempt to give us something more. It recommends "that official shorthand writers should be attached to all Courts of record to take and transcribe all judgments. The transcripts should then be sent to the judges for such revision as they might consider it desirable to make in them. After a reasonably short period, not exceeding if possible a week, those transcripts would be returned to a central office at the Law Courts, where copies could be obtained by the reporters and by any other persons on payment of a fee. All

judgments would be filed in the central office, and would be indexed by an official specially appointed for this purpose."

This recommendation of the minority report is logical and courageous. It is perhaps even an excess of logic and of courage at the outset to propose that shorthand writers should be attached to all Courts of record, which includes County Courts (County Courts Act, 1934, s. 1 (2)). It seems a formidable proposal that all judgments, including all judgments of all County Court judges, should be taken and transcribed and revised and filed in the central office. One may doubt whether the judges of the busy County Courts would altogether appreciate the compliment. And one doubts whether Professor Goodhart really had in mind so extensive a scheme of reform. If his proposals were in fact limited to the taking and filing of judgments of the superior Courts of record, it would mean no more than an extension of the scheme of official note-taking in witness actions which was introduced in 1937, following the recommendation of Mr. Justice Atkinson's Committee (see Annual Practice, 1940, p. 1289). Such an extension of the existing scheme would scarcely be open to serious objection on the score that it "involves a charge on public funds" (majority report, p. 20). Why, if the interests of justice are at stake, should the majority hesitate, at this or any other time, "to make any recommendation involving an increase of the public burden"? Nor can the proposal really be said to "involve the imposition upon the Judges (of the superior Courts of record) of any (serious) additional burden."

The real ground of opposition to the proposal is perhaps to be found in the third objection which is raised in the Majority Report: "Some of us entertain doubts whether there is any real advantage, others are satisfied there is a grave disadvantage in having a permanent record of all judgments." The terms of this objection may perhaps be read in the light of a passage that appears on an earlier page (p. 20). "The fact remains that the judgment, except that part of it which is formal and may perhaps be called the order of the Court, is not matter of record. It might even happen that, in the absence of reports and shorthand writers and by the failure of Counsel to take a note, a judgment except the formal part of it might go unrecorded and forgotten. It would be on record that a Judge had decided a question in a particular way: why he had so decided would be unknown. *Perhaps no harm would be done.*"[1]

These passages from the Majority Report inevitably bring to

[1] The italics are ours. One may be permitted reverently to concur with the sentiment of the majority.

mind a certain well known piece of speculation that occurs in one of the speeches or judgments of the late Lord Sumner:[2] "The Master of the Rolls says that *Holman* v. *Wade*[3] 'is only reported in a most unsatisfactory manner, that is to say, it is only reported as a piece of news in the newspaper. . . . The difficulty about it is to ascertain exactly what it decided. As for this, if it had not been reported at all, it would still have been a decision, which, when brought to light by any means, must have been regarded as authority. I have often wondered what would happen, if some learned and industrious person compiled from the records and cases lodged by the parties in your Lordships' House, and the transcripts of your Lordships' opinions preserved in the Parliament Office, a selection of 'Unnoticed House of Lords cases.' The results might be somewhat unexpected but the decisions themselves all Courts, your Lordships' House included, would be bound to follow, whenever they applied."[4]

In reading the passage, one is left with the impression that the existence of these "unnoticed House of Lords Cases" did not greatly disturb the mind or legal conscience of Lord Sumner; or of his colleagues. Nor can it be without significance that even after a lapse of eighteen years the "learned and industrious person" whom he cited has failed to enter an appearance. The "Unnoticed House of Lords Cases" continue to be unnoticed; and to be binding law.

The complaisance of the House of Lords and of the Judges and representatives of the legal profession as, for example, the majority of the Committee on Law Reporting, in the incompleteness and imperfection of the existing system of reporting decided cases is perhaps due (among other causes) to the principle of inertia (which operates as powerfully among lawyers and judges as elsewhere); and to a more or less conscious desire not to fetter unduly the discretion of the judges in the future. On this point of discretion there come to mind cases like *Attwood* v. *Lamont*;[5] and *Bourne* v. *Keane*[6] which is said by Sir William Holdsworth to have been the greatest liberty which the House of Lords has ever taken with established legal principles.[7]

[2] The Turid: 1922, 1 A.C. 397, 413.

[3] *The Times*, 11th May, 1877.

[4] The passage that follows is not without its point: "As for the actual report in *Holman* v. *Wade*, it turns out, on reference to the original pleadings, to be very correct, and I think it is plain what was decided. It is true the report is very brief, and I wish this model were more often followed. We who deliver judgments would alone regret it." (1922, 1 A.C. at p. 414.)

[5] 1920, 3 L.B. 571; see particularly the celebrated judgment of Younger, L.J., at pp. 581–582.

[6] 1919, A.C. 815; *cf. Bowman* v. *Scarlan Society*, 1917, A.C. 406, 433.

[7] Holdsworth. *History of English Law*, viii, pp. 417–8. "In this case the House reversed dicta 317 years old, a decision 84 years old, and a rule which in 1917 Lord Parker had regarded as a settled rule of law."

Apart from the operation of the principle of inertia and apart from the laudable desire of the judges not unduly to fetter their discretion for the future, one feels that the complaisance that is shown towards an incomplete and (shall we say?) an unscientific system of reporting is due in some measure to an abiding tradition or belief that English law—meaning thereby the Common law in the widest interpretation of the term—consists rather in a set of ruling principles which ought to be reflected and illustrated in the cases than in a series or body of rules that are to be ascertained by a process of inference or if you will of induction from the decisions of the Courts.[8] If the law is to be ascertained by a process of inference or induction from decided cases, it would seem necessary and proper to have a permanent record of all judgments, for these judgments are the material from which the science of our law is to be inferred. If, on the other hand, the essence of the English law consists in a set of ruling principles which are reflected and illustrated in decided cases, it is no longer necessary to have a complete record of all judgments. It is kind to forget some; and sufficient to make a selection of the rest.[9] And here perhaps is the explanation of those cryptic words in the Majority Report: "Some of us entertain doubts whether there is any real advantage, others are satisfied that there is a grave disadvantage in having a permanent record of all judgments"; and of the more explicit statement "*Perhaps no harm would be done*" if it remained unknown why a judge had decided in a particular way.

From the researches of Dr. C. K. Allen and others it would seem that the habit of assimilating law to the natural sciences and treating the decisions of the Courts as the *data* from which our law is to be inferred by a process of "induction," so to say, is a modern device;[10] without any real foundation in history or authority. Thus, we are told[11] that there is "no trace of a doctrine in the Middle Ages that precedents were 'binding'; if a Court considered an alleged decision to have been ill-founded, it had no hesitation in rejecting it." Again, Vaughan, C.J., while fully

[8] Every textbook writer knows how difficult, and often how impossible, it is to derive any coherent or rational inference from a series of decided cases; or even from a series of judgments in the same case: *cf.* the judgment of Lord Shaw in *Sutherland* v. *Stopes*, 1925, A.C. at pp. 77–8. In such situations it is natural to proceed by way of selection, or of emphasis.

[9] It will be remembered that the speculation of Lord Sumner concerned a *selection* of the "Unnoticed House of Lords Cases." One may perhaps here irrelevantly recall the criticism made by a pamphleteer of the seventeenth century of Equity judges who are "inquisitive after precedents": "Some judges, when they seem doubtful what to determine in a cause will be inquisitive after precedents; which I cannot conceive to what purpose it should be, unless that being desirous to pleasure a friend . . . they would fain know whether any before them have done so ill as they intend to do."—Harg, Law Tracts, 446

[10] Or disease. [11] *Law in the Making*, 3rd edition, p. 300.

conscious of the importance of case law, is clear that "if a Court give judgment judicially another Court is not bound to give like judgment unless it think that the judgment first given was according to law."[12] Lord Mansfield, too, had a flexible view of the relation of precedent to principle: "The law of England would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty. But the law of England, which is exclusive of positive law, enacted by statute,[13] depends upon principles; and these principles run through all the cases according as the particular circumstances of each have been found to fall within the one or other of them."[14] And there is the modern statement of Lord Sterndale that "The Common law consists of about half-a-dozen obvious propositions but unfortunately nobody knows what they are."[15]

How comes it that nobody knows what they are? If we reject (as the majority of the Committee on Law reporting appear to reject) the view that Law is a species of natural science of which the decisions of the Courts furnish the *data*, and adhere to the view that it consists rather of a body of principles which are illustrated in the cases, it is important to ascertain what are these root principles of the Common law. The writings of Maitland and of Holdsworth[16] have indicated clearly enough the sources from which the Common law drew its principles. They were the Roman law, the Canon law, and the writings of the moralists and the theologians of the Middle Ages.[17] For example, Stephen Langton had been professor of Theology at Paris before he returned to England and drafted Magna Carta. Bracton was skilled in the Canon as well as in the Roman law. Indeed, his duties as Archdeacon of Barnstaple and Chancellor of Exeter made an expert knowledge of the Canon law for him a matter of necessity. Sir John Fortescue was deeply versed in medieval philosophy and theology and borrowed from Aquinas the constitutional distinction between *regimen regale* and *regimen regale et politicum*; that is, between absolute and constitutional monarchy, which was to be so useful later in the political controversies of the Stuart period. Littleton, too, was well read in philosophy;[18] and Sir Thomas More, who had been

[12] *Law in the Making*, 3rd edition, p. 301.

[13] It is necessary to retain the same reservation, even in the twentieth century.

[14] *Jones* v. *Randall* (1744), Cowper, 37, 39.

[15] Per His Honour Judge Dowdall in a letter to *The Times*, 26th Jan., 1932. *cf.* Jhering, *Geist*, iv. 235–6, on the "economy" of legal ideas: *Le maître travaille avec une liberté plus large, car il est plus sûr de sa science*; cited Holdsworth, iii, 96.

[16] See e.g. Maitland, Roman Canon Law in England, *passim*; Pollock and Maitland, I, 132–4; Holdsworth, i, 303, ii, 125, 134, 146, 173, 175–8, 202–3, 244, 287, 326; iii, 140, 456.

[17] Holdsworth, ii, 128; iv, 22, 223.

[18] Coke, Littleton, Preface.

reader in English law at one of the Inns of Court, and became the most successful Common law practitioner of his time, had such an acquaintance with philosophy and theology that he gave a series of lectures to "all London" on the *de Civitate Dei* of St. Augustine; and was invited by the King and by the bishops to answer Luther and Tyndale and others in matters of theology. Among those with whom he fell into controversy on these matters was Christopher St. Germain, whose *Doctor and Student* was to exercise so much influence on the Chancery lawyers in later centuries.[19]

Now, this relation of law to philosophy (that is, to psychology, and metaphysics and ethics) and to theology is an abiding thing. The books are full of cases where the issue involves a discussion of one or other of the Aristotelian categories of "substance" or "essence" (or in its dynamic aspect, "nature") and "accident," e.g. quantity, quality, or relation; not to mention place and time. Thus, according to Coke, in a case in the Exchequer Chamber concerning a Patent,[20] it was laid down that "the privilege must not be contrary to law; such a privilege as is consonant to law must be *substantially* and *essentially* newly invented; but if the *substance* was in *esse* before, and a new addition thereunto, though that addition make the former more profitable, yet it is not a new manufacture in law; and so it was resolved in Bircot's case . . . for there it was said that that was to put but a new button to an old coat: and it is much easier to add than to invent." The same distinction between "substance" (*ens per se*) and "accident" (*ens entis*) underlies the old distinction between things in gross (a thing by itself and independent) and things merely appendant or appurtenant to something else.[21] By what is called "a curious psychological process" we are told that the lawyers realised that what we now call a Corporation is a "gros" or something which had an existence *per se*. And thus, it seems, they came to the idea of an individuality composed of the members of a Corporation, or as we might now say, to the idea of a *persona ficta*.[22] This rule, we are told, "is in accordance with the theories of the canonists . . . but it would seem that English law arrived at this result by a road of its own."[23] What is the nature (if the term be permitted) of corporate personality? Is the unity of a corporate body an "essential" unity of "being," or an "accidental" unity of

[19] Holdsworth, iv, 275–6.
[20] Bircot's case, Pasch, 15 Eliz., cited Coke, 3rd Inst. c. 85, p. 183.
[21] Holdsworth, iii, 475, citing Pike, Y. B., 16 Ed. III (R.S.) i, xlvi.
[22] *Ibid.*
[23] Holdsworth, iii, 675–6; 484. A corporation is said to be "*of no substance*, a mere name, and yet a person." "*Le corporacion d'eux n'est q'un nosme que ne poit my estre view, et n'est my* substance." *Cp.* Dicey, Law and Opinion, 153.

"relation"? Is a corporation a mere name; or a notion; or a true reality, a "realer Gesammtperson" with a "Gesammtwille" and a "Gesammthandlung"? The answer is of immense importance for law and politics: but to find the answer one needs to travel beyond the limits of these sciences; one needs the assistance of psychology, and metaphysics; and perhaps also of ethics.

Nor is it only in the remote fields of Real Property and Patent law and Corporate Personality that the Aristotelian categories are of significance and importance. The distinction between "substance" and "accident" is often vital in ordinary Common law cases, in cases e.g. which involve discrimination between "condition" and "warranty." "There are some (obligations) which go so directly to the *substance* of the contract or in other words are so *essential* to its very *nature* that their non-performance may fairly be considered by the other party as a *substantial* failure to perform the contract at all. On the other hand, there are other obligations which, though they must be performed are not so vital that a failure to perform them goes to the *substance* of the contract."[24] Again, is it too much to say that the much disputed case of *Bell* v. *Lever*[25] turned largely on the distinction between "substance" or "essence" and "quality"?

Enough has been said perhaps to justify the opinion of Professor Holdsworth that "a purely professional development is not good for the health of any legal system."[26] The law needs for its refreshment something more than is to be found in the existing series of Reports; or than is likely to be found in any extension of the existing system of Reporting.[27] For jurisprudence is what Ulpian defined it long ago to be: *divinarum atque humanarum rerum notitia, justi atque injusti scientia.*

RICHARD O'SULLIVAN.

[24] *Wallis* v. *Pratt*, 1910, 2 K.B. 1003, 1012, per Fletcher-Moulton, L.J.; *cf. Flight* v. *Booth*, 1 Bing N.C., per *Tindal* C.J. (misdescription in a material and *substantial* point); *Thacker* v. *Hardy*, 4 QB.D. 685, 695.

[25] 1932, A.C. 161. The notions of "substance" and "quality" naturally appear in certain statutes: e.g. the Food and Drugs Acts; and the Sale of Goods Act.

[26] Holdsworth, ii, 591; iii, 596.

[27] One could wish that the "learned and industrious person" whom Lord Sumner desiderated might be induced to study for us the philosophical and theological bases of the Common law; and its ultimate principles. Such a study might conceivably be of even greater interest and utility than research among the "Unnoticed House of Lords Cases." I am told that Professor Le Bras of the Sorbonne has lectured at University College, London, on the philosophical and theological ideas that underlie the development of Medieval law in Europe, including of course the English Common law; but I have not had an opportunity of reading any report of his lecture.

TRUSTS OF MOVEABLES IN PRIVATE INTERNATIONAL LAW[1]

THE object of this article is to examine shortly the rules of Private International Law relating to trusts created *inter vivos* or by Will. It is not intended to deal with trusts of immoveables and the only trusts of moveables to which reference will be made are express trusts.

The initial difficulty is that while there is a considerable body of authority to be found in the decisions of the courts of the United States, the English cases are scanty and often misleading. It is therefore proposed to look at the rules in the United States which are applied in order to determine which law governs a particular trust and then to consider how far such rules are applied or capable of application by English courts in similar cases.

Before proceeding further, however, it is perhaps desirable to enter three caveats:—

(*a*) In investigating any problem apparently arising on this subject care must be taken to ascertain whether the particular problem relates rather to the transfer of the trust property to the trustees than to the creation or administration of the trusts which the trustees are called upon to administer. This point is perhaps of peculiar importance in connection with testamentary trusts where it is sometimes difficult to sever questions affecting the administration of the deceased's estate by his personal representatives from questions affecting the trusts which he has purported to create.

If it is right to emphasise the distinction it follows that the problems with which this article is concerned can only arise once it is established by reference normally to the *lex rei sitae* that the trust property has duly vested in the trustees.

(*b*) It cannot be regarded as certain that propositions deducible from decisions in marriage settlement cases are necessarily applicable to ordinary trusts of moveables. It is at least arguable that marriage settlement cases are *sui generis*.

(*c*) In this article it is not proposed to study in detail the bearing of *ordre public* upon questions arising out of

[1] This article was in course of preparation when the war broke out. The author, who is serving with His Majesty's Forces, was not able to give the article its final completion, but in view of the great importance of the subject-matter, which so far has never been analysed in this country, the article has been printed in its present form.

the subject under discussion, as it is felt that such a study might more properly be reserved for a treatment of the doctrine of *ordre public* generally. The importance of the doctrine should not however be overlooked, and is well exemplified by *Re. Fitzgerald* (*infra*).

Dealing first with the law prevailing in the United States,[2] it seems to be well recognised, at any rate in the American literature, that an initial distinction must be drawn between

(*a*) the creation of a trust, and
(*b*) the administration of a trust,

on the ground that the system of law applicable to (*a*) may not always be the same as the system applicable to (*b*).

It further appears, although at this point there is some dissension, that it is necessary to make a distinction both in (*a*) and (*b*) between

(1) Trusts created *inter vivos* (called living trusts), and
(2) Trusts created by Will.

If there is any importance in this form of classification of the problems arising on the subject, it might be expected that there would be a clear definition by the American authorities of the problems to be considered in connection with the creation of a trust on the one hand and the problems to be considered in connection with the administration of a trust on the other hand.

Unfortunately this is not so. Beale, for example, contents himself with the statement that administration questions are any questions arising after the trust has come into being, a statement which upon examination proves not to be very helpful.

It is submitted, however, that there is this logical distinction between creation and administration—namely, that all questions as to the formal or essential validity of a trust including the validity of the beneficial interests intended to be created thereunder and the validity of the detailed provisions contained in the trust instrument are questions affecting the creation of the trust. Any other questions are administrative questions. If this is correct, then, for example, rules relating to perpetuities in the English sense are rules relating to the creation of trusts in that such rules determine the validity of the beneficial interests.

On the hypothesis that the foregoing is a correct description of the questions relating to the creation of a trust, it is now

[2] The literature to which reference has chiefly been made for the purposes of this article is as follows:—
The Restatement issued by the American Law Institute;
Beale's *Conflict of Laws* at p. 1018 *et seq.*;
An article by Swabenland, 45, *Yale Law Journal*, p. 438;
An article by Carver, 44, *Harvard Law Review*, p. 161.

possible to examine the American rules determining which law governs the *creation* of a trust involving a foreign element. The application of these rules is, without doubt, dependent solely upon the circumstances pertaining at the date of death in the case of a testamentary trust or at the date of the execution of the instrument in the case of a living trust. Any subsequent change in these circumstances, e.g. an alteration of the domicil of the trustee or of the *situs* of the property, cannot affect the matter. The question, having been answered by reference to the appropriate facts at the appropriate date, is answered once and for all. It may perhaps be mentioned in parenthesis that on this point English Law agrees with American Law (*Re Fitzgerald*, *infra*).

Beale, in discussing which law governs the creation of a trust, distinguishes between living and testamentary trusts.

As regards living trusts, he says that the system of law applicable is the system prevailing in the *situs* of the trust property except that in the case of the marriage settlement, the "proper law" is applicable. An initial difficulty which clearly arises is what happens when the trust property has no common *situs*, for it is difficult to imagine the trust being validly *created* as to some property but not as to other property. In fact the existence of this difficulty lends colour to the suggestion that Beale's rules are based upon a failure to distinguish between questions affecting the vesting of trust property in the trustees, in which case no doubt each item of property must be subject to its own local law, and questions affecting creation proper, in which case there does not seem to be any overriding reason why respect should be paid primarily to the *lex rei sitae*.

However this may be, the American rule in the case of living trusts (other than Marriage Settlements) as stated by Beale is that generally the *lex rei sitae* governs creation.

In the case of testamentary trusts, however, Beale gives the law of the domicil of the testator as the law governing creation, subject to an exception when by the law of the domicil the trust infringes the perpetuity rule but by the *lex rei sitae* it does not. In such case, says Beale, the law of the domicil is disregarded.

Carver argues[3] that it is difficult to see why the converse of the exception should not also apply—namely, that if there is a perpetuity by the *lex rei sitae* the trust cannot be validly created even if it is valid by the law of the domicil. If Carver is right then in effect it seems that the rule in the case of testamentary trusts is the same as the rule in the case of living trusts, namely, that the

[3] 44, *Harvard Law Review*, p. 161.

lex rei sitae governs where it conflicts with the law of the domicil. But there is no reason to suppose that Carver is right, unless he quotes authority and until he does so it is felt that Beale's rule must be accepted.

Having dealt with the American rules governing creation of trusts, it is now possible to consider whether these rules are different in the case of the administration of trusts and if so, in what respect they are different.

Beale prefaces his discussion of the point by a definition of "the seat of the trust."

In the case of living trusts he says that the location of the seat of the trust depends on the intention of the settlor, and so for example if the settlor appoints trustees domiciled abroad he may have intended the trusts to be governed by the law of their domicil. If, on the other hand, the trust property consists largely of land the seat of the trust will probably be the *situs* of the land for the purposes of the chattels as well as the land.

In the case of testamentary trusts Beale indicates that the seat of the trust is generally the domicil of the testator, but refers to a possible exception in the case where a foreign corporation is appointed trustee.

Having so defined the conception, Beale then says that the law governing the administration of the trust is the law of the seat of the trust. In the Restatement the rules with regard to the law governing administration are dealt with in a similar manner.

Swabenland,[4] offers some criticism of this statement of the law and after examining the authorities he comes to the following conclusions—

> (*a*) In the case of the administration of testamentary trusts the law of the domicil of the testator and the law of the place at which Probate is extracted (usually identical) have prevailed in every decision except one, however the other possible points of contact have been distributed.
>
> (*b*) In the case of the administration of living trusts he agrees that the intention of the settlor is paramount in deciding the governing law but he infers from the decisions that the Courts in construing such intention have attached greater importance to the domicil of the settlor and the place where the instrument is executed.

In the light of the foregoing it may now be possible tentatively to summarise the rules in the United States as follows—

(*a*) In the case of living trusts the law clearly recognises

[4] 45, *Yale Law Journal*, p. 138.

the distinction between creation and administration, the former of which is governed, if Beale be right, primarily by the *lex loci rei sitae*, while the latter is governed by the law intended by the settlor to be the seat of the trust.

(*b*) In the case of testamentary trusts it appears to be generally accepted that the law of the domicil of the testator governs both creation and administration and there is therefore no point in a normal case in drawing a distinction between the two conceptions. On the other hand it is the intention of the testator which is relevant in determining the seat of the trust and if a reference to some other law than the law of the domicil can be inferred that law will govern administration.

It may now be appropriate to turn to the English authorities in order to ascertain how far if at all the American rules are applicable in this country. At the outset it may be mentioned that no help can be obtained from English text-book writers as neither Dicey, Foote, Westlake nor Cheshire seriously grapples with the subject.

It is proposed to deal first with testamentary trusts, and secondly to consider living trusts or trusts created *inter vivos*.

With regard to testamentary trusts a comparatively early case is *A.-G.* v. *Campbell* (1872, 41 L.J., Ch. 611). The Testator, an Irishman domiciled in Portugal, made his Will in English form, leaving the residue of his property to trustees to invest in English Consols. Out of the income they were to pay an annuity to his widow, and the question arose whether on the death of the annuitant the share appropriated for the payment of her annuity was liable to Succession Duty in England under the appropriate English Statutes. The House of Lords decided that the liability to Duty was attracted. Lord Westbury said that on death the question of administration of assets belongs to the law of the domicil of the testator, but that when the residue is delivered to legatees who are to hold on certain trusts one of which is to bring the property to this country and invest it here there is a settlement of English property. That settlement becomes subject to English Law under which it is held, by virtue of which it is enjoyed and under which it is ultimately administered.

The case seems to be a clear authority against the application of the law of the domicil and in favour of the *lex rei sitae*, and from the words of Lord Westbury it would appear that the *lex rei sitae* might apply both to the creation and to the administration of the trust. On the other hand on the facts it was only

necessary to determine which law applied to the administration of the trust as no question of creation was involved, and there is no reason to suppose that Lord Westbury was excluding the possibility of the law of Portugal as the law of the domicil applying to the creation of the trust.

It is noteworthy too that English Law was held to apply not because it was the intention of the testator that it should apply but because English property, namely, Consols, was involved; this is in distinct contrast with the American rule, and on this case alone it may be said that there is a germ of a rule that the administration of testamentary trusts is governed by the *lex loci rei sitae.*

The next case to be considered is *Re Aganoor's Trusts* ((1895), 64 L.J., Ch. 521). The testatrix died domiciled in Padua, leaving a sum of Consols upon certain trusts. The trustees commenced proceedings in England to determine who were the beneficiaries entitled under the trusts, because after death of the testator the law of Padua was altered by a statute which had the effect of invalidating retrospectively the trusts created by the Will. By the law of England the trusts were valid. The case therefore raised a question affecting the creation of the trusts, and it is to be observed that the facts are similar to those in Campbell's case, in which the House of Lords held that English Law applied, the only difference being that in Campbell's case the question was as to the administration of the trust. In *Re Aganoor,* however, Romer, J., held that English Law would adopt the law of Padua as the law of the domicil, but that it was the law of Padua as it stood at the date of death which was adopted. The subsequent retrospective change of the law was therefore immaterial.

It is thought the comparison of this case with *Campbell's* case is most instructive in that it shows English Law adopting a different rule (whether consciously or unconsciously) in the selection of the law governing the creation of the trust from the rule adopted in the case of the administration of the trust. If the logical conclusions to be drawn from the two cases are accepted then the following rules emerge—

> (*a*) the law governing the creation of a testamentary trust is the law of the domicil of the testator wherever the property may be situate;
>
> (*b*) the law governing the administration of a testamentary trust is the *lex loci rei sitae* whatever the domicil of the testator may be.

There is one case which may be referred to before passing on to

trusts created *inter vivos* and that is *Canterbury* v. *Wyburn* ((1895) A.C., p. 89), a Privy Council decision on appeal from Australia. A domiciled Victorian bequeathed £10,000 to the City of Canterbury in England on trust to buy land in England for the purposes of a library and reading room. The question was whether the bequest was valid having regard to the English Mortmain Statutes. It was held that the will was not affected by English Law and that the bequest as between the executors and the legatees was valid because there was nothing in Victorian law as the law of the domicil to invalidate it. Whether the money having been received by the legatees could be applied by them as directed was of course outside the scope of the case and was not decided. The case is not very helpful because it deals only with the transfer of the trust property to the trustees by the executors and does not really concern either the creation or administration of the trust. It is however interesting to speculate on the position arising after the City of Canterbury received their legacy. They clearly could not invest the money in the purchase of land for charitable uses because of the English Statutes and therefore it may be suggested that the rule enunciated above, namely, that the law of the domicil governs the creation of the trust, is infringed. It should be pointed out however that as the trust property would become immoveable property were the trust executed a rule relating to trusts of moveables can have no necessary application.

Turning to trusts created *inter vivos* it should be emphasised that the English cases now to be examined relate to marriage settlements, and it does not therefore follow that the principles to be deduced from them apply to ordinary trusts. It is helpful to consider them however while realising that their effect may be limited.

In *Re Bankes* ((1902), 2 Ch. 333) a marriage settlement was executed by an English woman domiciled in England and an Italian domiciled in Italy in English form and relating to property in England. There was a covenant by the woman to settle after acquired property, which covenant was valid by English Law but void by Italian Law. The question was whether certain property to which the woman became entitled after marriage was caught by the covenant, and it will be appreciated that as the real issue was as to the validity of a provision in the trust instrument, namely, the covenant to settle, the problem of the law applicable to the creation of the trust was directly raised. It was held that English Law applied and indeed it is difficult to see how Italian Law could have been applied. It is noteworthy that the Court was very largely impressed by the point that the covenant would have been

invalid by Italian Law, and therefore the logical conclusion is that it is the intention of the parties which (within limits, no doubt) determines the law governing the creation of the trust.

Re Fitzgerald ((1904), 1 Ch. 573) is a most interesting case which appears to support *Re Bankes* and apply the principle of that case with complete logic. There was a marriage settlement whereby the woman domiciled in Scotland settled on the man domiciled in England property consisting mainly of Scottish heritable bonds (immoveable property) and a smaller sum of cash. The settlement was in Scottish form and conferred on the husband an alimentary life interest, which is unknown to English Law. The six trustees were all English save one. The husband when residing in England created certain charges on his life interest which if the life interest were construed in its Scottish sense would not have been enforceable against it. The Court of Appeal decided that although as a general rule the law of the matrimonial domicil governs marriage settlements this is a presumption which yields to a contrary intention. Here it was clearly intended that Scottish Law should apply, and accordingly the husband took only such interest as was recognised by Scottish Law and the English encumbrancers were defeated.

The case is clearly a decision on the creation of the trust as it relates to the nature of a beneficial interest conferred, and it follows *Re Bankes* in showing that the law applicable is the law intended by the parties who must be presumed until the contrary is shown (in the case of marriage settlements) to have adverted to the law of the matrimonial domicil. That the case is a good authority on trusts of moveables follows from the fact that the trust property included a sum of cash which had in fact been invested in English Consols. This fact makes it all the more surprising that the English Court did not scruple to give extra-territorial effect to a Scottish form of life interest which resulted in English creditors being deprived of their apparent right to resort to property situate in England. The importance of *Re Fitzgerald* cannot be over-emphasised especially having regard to the light which it throws upon the attitude of the English Court to the doctrine of *ordre public*. This aspect of the case is one which would repay careful study in any treatment of that doctrine.

The last case which will be mentioned is *Re Hewitt* ((1915), 1 Ch. 228). The two cases just considered relate only to the creation of trusts *inter vivos* but *Re Hewitt* appears on the face of it to deal with administration. There was a marriage settlement in Scottish form executed by a domiciled Scotsman and a

domiciled English woman. The original trustees were domiciled in Scotland. At the date of the proceedings the beneficiaries and trustees were all domiciled in England, and the trust property was also situate there. It was desired to appoint the Public Trustee as sole trustee and the question was whether he could be so appointed. Eve, J., held first, that this was a settlement governed and construed according to Scottish Law and that the fact that the beneficiaries, trustees and property were in England did not alter the position. He further held that the Public Trustee was not authorised to be trustee of a settlement governed and construed by a law other than English Law.

It has been forcibly argued that the result of this decision is that English Law does not recognise any distinction between questions of creation and questions of administration of trusts, and that whatever law governs the creation must also govern the administration of the trust. On this some comment may be offered—

> First, it has already been submitted that decisions relating to trusts created *inter vivos* should not be necessarily applied to trusts created by will and therefore even if *Re Hewitt* justifies the point which is sought to be made it cannot affect the rules formulated above regarding testamentary trusts. Secondly, it does not necessarily follow that Eve, J., decided the case as he did because he was of opinion that the administration of the trust was governed by Scottish Law. At any rate it is not necessary to read his judgment in that way. It is consistent with his judgment to argue that he held (*a*) that the Public Trustee could not act in trusts, the creation of which was governed by foreign law whether or not such trusts were to be administered in accordance with that law, and (*b*) that the creation of the particular trusts before him was definitely governed by Scottish Law and the subsequent alteration of circumstances did not have the effect of altering the law governing their creation. (*See Re Fitzgerald* and the American rule.)
>
> If this is the correct way of regarding *Re Hewitt* it was not necessary for the learned Judge to decide which law governed administration at all.

In conclusion it may perhaps be helpful to summarise first the rules apparently adopted in the United States, and secondly the rules which it is submitted are deducible from the English cases. It follows that if the deductions which have been

made from the English cases are correct the rules adopted in the two countries show marked divergences—

1. *In the United States:*

A. *Creation.*

(i) *Living Trusts.*

Probably *lex loci rei sitae* except in marriage settlements when proper law governs.

(ii) *Testamentary Trusts.*

Generally law of domicil of testator.

B. *Administration.*

(i) *Living Trusts.*

Law of seat of trust ascertained in accordance with intention of settlor.

(ii) *Testamentary Trusts.*

Generally law of domicil of testator.

2. *In England:*

A. *Creation.*

(i) *Trusts created* inter vivos.

Proper law as ascertained in accordance with intention of settlor. (*Re Banks; Re Fitzgerald.*)

(ii) *Testamentary Trusts.*

Law of domicil of testator. (*Re Aganoor's Trusts.*)

B. *Administration.*

(i) *Trusts created* inter vivos.

No authority—unless *Re Hewitt* means that law governing creation and administration are necessarily identical.

(ii) *Testamentary Trusts.*

Possibly *lex loci rei sitae.* (*A. G.* v. *Campbell.*)

P. E. N. Croucher.

ENGLISH LAW IN THE MAKING

The modern development of the law of England is not only a matter of interest but an important subject of study to the legal profession in the United States. To an American lawyer, indeed, England tends to seem a forty-ninth state, albeit the oldest and for legal history the most important, so that a statute of Parliament or a judgment of the House of Lords has much the same significance, for example, to a member of the bar of New York as has an act of the legislature of Massachusetts or a decision of the Supreme Judicial Court of that sister State. The Judicature Acts are as familiar to American students of procedural law as is the pioneer New York Code of Procedure of 1848 or the Federal Equity Rules of 1912; the decision of the Court of Appeal in *Warner Brothers Pictures, Inc.* v. *Nelson*[1] recently formed the basis for an important moot in a large American law school; the English property legislation of 1922 and 1925 has been the subject of detailed analysis in American legal journals,[2] as has the recent Criminal Justice Bill;[3] in the judicial field, to give but a single example, the Appellate Division of the Supreme Court of New York in 1928 decided an important case[4] on the sole authority of *Rutherford* v. *Acton-Adams*.[5] The forces, therefore, that have shaped and are shaping the form and substance of English law are matters of moment to the American legal profession.

It is with this background of informed and vital interest in a cognate legal system that an American lawyer comes to examine what, he is told on high authority, is "one of the classics of modern English jurisprudence"[6] —the third edition of Professor C. K. Allen's *Law in the Making*.[7] He will realise of course, from prior editions, that the book is not, as the title might indicate, concerned with the phenomena of nascent law in early times or in primitive societies, but rather with the "material sources" of law in developed systems—in the author's words, with "those agencies by which rules of conduct acquire the character of law by becoming objectly definite, uniform, and, above all, compulsory"[8]—and that the sources discussed by the author, as being those "which have been the most frequent subjects of jurisprudential study,"[9] are custom, precedent, equity and legislation. Such a reader is also likely to know that the first edition of *Law in the Making*[10] was received with acclaim in England[11] and with substantial

[1] [1937] 1 K.B. 209.

[2] See, for example, Warren, *The Law of Property Act*, 1922, 21 Mich. L. Rev. 245 (1923); Bordwell, *Property Reform in England*, 11 Ia. L. Rev. 1 (1925); Schnebly, *"Legal" and "Equitable" Interests in Land under the English Legislation of* 1925, 40 Harv. L. Rev. 248 (1926).

[3] See Note, 40 Col. L. Rev. 105 (1940).

[4] *Radel* v. 134 *West 25th Street Bldg. Corp.*, 222 App. Div. 617, 226 N.Y. Suppl. 560 (1928).

[5] [1915] A.C. 866. Perhaps, by way of reciprocity, New York may lay claim to some influence on the decisions in *O'Donoghue* v. *Stevenson*, [1932] A.C. 562, and *Haynes* v. *Harwood*, [1935] 1 K.B. 146.

[6] Campbell, Book Review, 56 L.Q. Rev. 193, 194 (1940).

[7] Oxford, 1939. Page references *simpliciter* in later footnotes are to this book and edition.

[8] P. 1.

[9] P. 60.

[10] 1927.

[11] See review by H. D. H. [Hazeltine], 44 L.Q. Rev. 236 (1928).

favour in the United States,[12] that the second edition[13] added little to the first,[14] and that the present edition contains much new material, including a survey of recent tendencies in jurisprudence which takes account of continental and American as well as English developments.[15] What will this American reader learn from the book as to the sources of modern English law and of law generally, and to what reflections on English law and jurisprudence will he be impelled?

In what follows I have sought to set forth at some length and with complete candour the impressions and reflections which Professor Allen's latest edition made and induced in the mind of one such reader, and to supplement those impressions and reflections by some comments on what seem to me significant forces in the modern making of English law.[16] Perhaps the views here expressed may be not wholly without value to English lawyers, for, if I may borrow from Lord Macmillan, "while the nations to which we belong may be far separated in space . . . we have in our common devotion to the science of the law a bond which unites us,"[17] and, I may add, a common legal tradition and heritage as well as common problems of social and legal adjustment in a time of change. So much by way of *apologia pro scripta mea*; I turn to a somewhat detailed examination of *Law in the Making* and its simplications.

Professor Allen regards custom as the "natural starting-point" for his inquiry into the agencies by which law comes to be such.[18] His discussion of the nature and origin of custom and its interpretation and application by the courts, although illuminated by occasional flashes of insight,[19] is, I think, open to serious criticism. What Professor Allen is discussing is what Pound has described as custom of popular action rather than custom of judicial decision.[20] His thesis is that such custom is law *ex proprio vigore*, and that when it is recognised by the courts they are simply enforcing a pre-existing legal rule—although he is compelled to admit that the courts have the power "to change the law which it [custom] embodies."[21] It was this view, expressed in the same terms in the first edition, that Professor John Dewey criticised, pointing that "something happens

[12] See reviews by Dewey, 28 Col. L. Rev. 832 (1928); J. P. D. [Dawson], 27 Mich. L. Rev. 361; Rottschaefer, 13 Minn. L. Rev. 276, 2 So. Calif. L. Rev. 504 (1929); Corbin, 38 Yale L. J. 270 (1928). For a much more critical view, see review by Cook, 22 Am. Pol. Sci. Rev. 989–991 (1928).

[13] 1930.

[14] See review by Sears, 16 Corn. L.Q. 146 (1930). To be sure, a review by P. H. W. [Winfield], 46 L.Q. Rev. 523 (1930), says that the second edition has been "thoroughly revised . . . both in form and substance," but this seems a substantial overstatement.

[15] The failure of the second edition to include any such discussion was rather sharply criticised in a review by Shartel, 29 Mich. L. Rev. 542 (1931).

[16] Needless to say, I speak of the situation as it was before the outbreak of the Second World War, and as we devoutly hope it will ere long be again, and on a securer basis.

[17] Macmillan, *Law and Literature* (1937), 102.

[18] P. 60.

[19] See, for example, the discussions of the economic basis of such customs as slavery and unfree feudal service (pp. 86–87), and of how far individual creativeness in the juristic elaboration of custom is conditioned by circumstances of time and place (pp. 114–115).

[20] See Pound, *Law and Morals* (1924) 19–23. Professor Allen (pp. 115–124) clearly recognises this distinction.

[21] P. 141.

when a custom becomes law."[22] Professor Allen's answer is that this "something" is the same when a custom is received by a court as law as when a "proposition of law" is thus received.[23] Assuming, as he does, that "Common law rules" have a mystical sort of existence independent of the decisions of the courts[24] (of which more hereafter), he regards custom as being "law" in just the same sense, independent of judicial or statutory recognition, subject only to the veto of the courts. In view of Professor Allen's apparent reluctance to admit that the courts make law,[25] this concession that they may unmake it seems not a little surprising. In any event, the attempt to describe popular custom as law of itself seems less useful as terminology and less valid as description than Gray's view of such custom as one of the kinds of raw material from which law is fashioned by courts,[26] or, I would add, by legislature.

Much more open to criticism, however, than this conception of popular custom as positive law though on probation, is the inadequacy of the author's account of the nature and origin of custom. This is a question not of law but of anthropology, and it must be regretfully recorded that Professor Allen's lack of acquaintance with modern cultural anthropology seems to be decidedly extensive. To begin a discussion of popular custom in terms of habit by equating "habit" in man (learned behaviour) to "instinct" in the "lower forms of life" (unlearned behaviour) is startling enough;[27] but to say that there is "not a vast difference between the automatism of an ant and the tribal habits of an Australian aboriginal" is to astound equally entomologist and Australist.[28] To discuss the problem of "legal" rules in primitive society, as Professor Allen does, without any reference to Malinowski's significant studies[29] seems even more remarkable. Indeed, it would appear, on the evidence of this book, that Professor Allen's anthropology both begins and ends with Sir Henry Maine. The usefulness of a discussion of custom as a source of law which is thus limited seems doubtful, to say the least.

Professor Allen's treatment of precedent is for the most part a history and attempted rationalisation of the rigid doctrine of *stare decisis* to which the English courts have committed themselves in comparatively recent times. The historical discussion includes Roman and modern French law, but five-sixths of the pages on this topic are devoted to a detailed account of the growth and present status of the English precedent system. American experience is dismissed with the brief statement that in the United States, "largely owing to the diversity of jurisdictions and the

[22] Book Review, 29 Col. L. Rev. 832, 833 (1928). Professor Allen devotes an "Excursus" entitled Custom as Law (pp. 146–150) to an attempt to answer Dewey's criticism.

[23] P. 146.

[24] It would seem of some significance in this connection that to Professor Allen the common law is always the Common Law.

[25] See pp. 257–264, 303.

[26] See Gray, *The Nature and Sources of the Law* (2nd ed., 1921), 282–301. See also the penetrating analysis of the notion of "customary law" in Ehrlich, *Fundamental Principles of the Sociology of Law* (transl. Moll, 1936), 470.

[27] P. 62. Compare Linton, *The Study of Man* (1936), 69–73.

[28] P. 62. Compare the discussion of the mentality and tribal customs of the "Australian aboriginal" in Porteus, *The Psychology of a Primitive People* (1931), 217–300.

[29] See Malinowski, *Crime and Custom in Savage Society* (1926), and his introduction to Hogbin, *Law and Order in Polynesia* (1934) xix–lxii. Nowhere in Professor Allen's book is Malinowski so much as mentioned.

overwhelming mass of precedents, the principle of *stare decisis* has created great difficulties and has been the subject of much controversy."[30] To some extent, it would seem, the author is attempting to develop a theory of the judicial process, but what emerges seems strangely naive as compared, for example, with the insights of Cardozo.[31] For one thing, he starts with assumptions as to the nature of the judicial process which, it seems to me, can only be described as outworn. In his view, the process of judicial decision is either "deductive" or "inductive."[32] The civilian mode of the approach in all cases, and the Common-law judge's function in interpreting statutes are said to be "deductive"; the Common-law mode of decision except where statutes are involved is regarded as "inductive." Quite aside from the obvious fact that, even on this hypothesis, Anglo-American case law involves "deduction" in applying legal principles to particular facts as well as "induction" in finding those principles in the precedents, this interpretation is simplistic in the extreme. Moreover, Professor Allen conceives of legal argument as "strict logical demonstration," and of court opinions (which he apparently assumes to reflect in all cases the actual grounds of judicial decision) as "logical expositions of principles" of the "Common law."[33] These conceptions seem to me to betray equal ignorance of logical theory and of the actual psychology and technique of judicial decision.[34]

Again, while insisting on the importance of *stare decisis* and giving a detailed account of the technical rules which have come to cluster around this doctrine in England, Professor Allen nowhere sets forth a satisfactory theory of the doctrine from any point of view—philosophic, psychological or pragmatic. Indeed, his only contribution would seem to be the negative one of pointing out that *stare decisis* in England has produced neither certainty nor flexibility in the law.[35] Nor does he give substantial aid with regard to the puzzling problem of why and how far a judge is "bound" by precedent. His theory seems to be that precedents are followed because they are "true" statements of "the law."[36] Apparently such precedents have innate and ultimately self-executing force in subsequent decisions. "Nothing which is a true precedent, in the sense that it correctly embodies a rule of the Common law, *can* be reversed by subsequent decision."[37] The courts, while they have "a certain degree of censorship over the

[30] P. 175, n. 1. Compare Fuller, Book Review, 82 U. of Pa. L. Rev. 551, 552 (1934).

[31] Professor Allen quotes (p. 259) from Cardozo, *The Paradoxes of Legal Science*, but makes no reference anywhere in his book to *The Nature of the Judicial Process*. Compare my review of Levy, *Cardozo and Frontiers of Legal Thinking* (1938), in 3 Mod. L. Rev. 76 (1939).

[32] P. 151.

[33] P. 302.

[34] The inadequacies of Professor Allen's views as to the logic and psychology of the judicial process are forcibly pointed out in Cook, Book Review, 22 Am. Pol. Sci. Rev. 989, 990–991 (1928).

[35] Pp. 290–296. Compare his valuable, if depressing, account of the actual operation of the precedent system in England, pp. 267–275.

[36] P. 251. It is difficult to reconcile this proposition with the author's criticisms of specific common law doctrines as "established" though "erroneous," and his discussion of the doctrine *communis error facit ius*, pp. 274–284. It may be pointed out in passing that his strictures upon the fellow servant rule as "a groundless fiction invented by Lord Abinger" (p. 281) can hardly survive the more critical examination of the problem in Pound, *The Economic Interpretation and the Law of Torts*, 53 Harv. L. Rev. 365, 373–382 (1940).

[37] P. 350. The italics are mine.

operation of precedent," have "no control over the principles themselves."[38] But is not this sheer mysticism? Professor Allen has been more fortunate (or more credulous) than Holmes; he has found his Common law to be "a brooding omnipresence in the sky" after all.[39]

Moreover, Professor Allen has, it seems to me, failed to appreciate the way in which precedent actually operates. He assumes that each decided case has its particular *ratio decidendi*. He has not realised that each case has and must have implicit in it a whole series of possible principles of decision.[40] When a case is decided, no one can be certain which of the possible principles of decision will *become* the true one. The later creative activity of the courts in restricting or expanding the precedent will have to tell us that. The precedent system is not Professor Allen's process of progressive revelation; it is a process of unevenly creative becoming.

When Professor Allen speaks of equity as one of the agencies by which rules of conduct acquire the character of law, he does not mean the "technical system distinct from the Common law,"[41] developed by the Court of Chancery. What he does mean is less clear. Sometimes equity seems to be thought of by him as a particular kind of natural law, sometimes as the "frame of mind" that seeks justice,[42] but mostly as the "element of discretionary justice" in the legal order.[43] But equity, thus conceived, is hardly an agency for the creation of law; it is rather an aspect of the law created. The conception of law as made up of "legal rules" which necessarily involve "uniformity" and "universality"[44] may involve eliminating discretion from "law." But this merely shows the artificiality of the conception that a separate discretionary element, called "equity," is an "agency" in the making of "law."

The concluding chapters of the book deal with legislation by Parliament and by subordinate governmental and private bodies.[45] Much of the discussion leaves an American reader with a feeling that the English judges just don't like statutes and that Professor Allen agrees with them. The

[38] Pp. 350–351.

[39] Compare Holmes, J., dissenting, in *Southern Pacific Co.* v. *Jensen*, 244, U.S. 205, 222 (1917): "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified."

[40] This is well pointed out in Oliphant, *A Return to Stare Decisis*, 14 A. B. A. J. 71, 72–73, 6 Am. L. School Rev. 215, 218 (1928). For example, to borrow Oliphant's illustration, if a decision holds that the defendant is not liable for inducing his daughter to break her promise to marry the plaintiff, it may be regarded as standing for any one of a series of principles, from the narrow one that fathers are privileged to induce daughters to break promises to marry, to the broad one that all persons are so privileged as to all promises made by anyone. See also Llewellyn's remarks in *The Bramble Bush* (1930) 63–66, 74–76, and in *Präjudizienrecht und Rechtsprechung in Amerika* (1933), Pt. I, 20–21.

[41] P. 347. Professor Allen's discussion of this "technical system" (pp. 333–336) is sketchy in the extreme. His treatment of Roman *aequitas* (pp. 315–321) is more satisfactory.

[42] P. 338.

[43] P. 349; compare p. 339.

[44] P. 306.

[45] These latter types of law-making are dealt with in a chapter entitled Subordinate and Autonomic Legislation. Under autonomic legislation, Professor Allen discusses the powers of public service corporations to make by-laws, the powers of self-government exercised by the Church of England and the Universities of Oxford and Cambridge, and the "autonomic rules" made by trade unions and employers' associations. How far this last category of rules can usefully be described as being "law" is not very satisfactorily discussed. See pp. 454–455.

doctrine that statutes "in derogation of the Common law" are to be construed strictly is "an essential guiding rule" without which "the continuity of legal development would be gravely imperilled."[46] While legislation cannot be avoided, "it is no impious wish on the part of any lawyer that if Parliament has to intervene in the development of the law, it should intervene as little as possible."[47] The strongly-expressed but not infrequently evaded rule of the English courts that they will not look at the legislative history of a statute in construing it—palpably related to a judicial attitude of hostility to statutory changes in the law—is discussed at some length, though inconclusively.[48] Professor Allen alternately attacks and defends the English judicial view that, in effect, an extraordinarily narrow version of the parol evidence rule applies to Acts of Parliament, apparently concluding that "our Judges are not wholly misled by their instinct when they distrust these uncharted waters" of legislative history.[49] He also discusses "literal or grammatical" interpretation, again without reaching any significant conclusion.[50] The value of this discussion is substantially impaired by the author's apparent assumption that the courts are confronted with the same problem in developing a statutory standard like that of "personal injury by accident arising out of and in the course of the employment" under the Workmen's Compensation Act, 1906,[51] and in determining the meaning of a descriptive term like "an electrically-propelled vehicle" in a statute imposing licensing fees.[52] In both cases, it apparently seems to Professor Allen, the problem is "to arrive at [the] exact meaning" of the words used.[53] He also states without

[46] P. 379. Professor Allen regards this "principle of strict interpretation" as dating from 1314, quoting (as in his earlier editions) a Year Book case of that date, but takes exception to the statement in Landis, *Statutes and the Sources of Law*, in *Harvard Legal Essays* (1914) 213, 235, n. 11, that "Professor Allen attempts to date the attitude back to the origins of the common law." See p. 378, n. 5. It would seem that a doctrine which is claimed to go back to a few decades after *De Donis* and *Quia Emptores* and two centuries before assumpsit can properly be said to be dated from the "origins of the common law" as that phrase is ordinarily used. Professor Allen also attacks the view of Landis and Pound that the doctrine of strict construction was a product of eighteenth century thought, relying mainly on Thorne, *The Equity of a Statute and Heydon's Case*, 31 Ill. L. Rev. 202 (1936). Thorne concludes that "the general attitude during the later Year Book period is one of jealousy for the common law which was not to be modified by statute more than could be avoided" (*id.* 208), referring, *inter alia*, to Year Book cases decided in 1479 and 1506 (*id.* 212). This is not the place for a detailed examination of this controversy as to history.

[47] P. 414.

[48] See pp. 404–405, 421–426, 429–431, 434–436. Compare the discussion of American practice in this regard in Chamberlain, *The Courts and Committee Reports*, 1 U. of Chi. L. Rev. 81 (1933); Note, 50 Harv. L. Rev. 822 (1937). These are, it should be noted, concerned almost exclusively with the practice in the federal courts. I know of no similar discussion of the American state practice. For an excellent brief discussion comparing English, American (federal) and continental practice, see Lauterpacht, *Some Observations on Preparatory Work in the Interpretation of Treaties*, 48 Harv. L. Rev. 549, 558–562 (1935).

[49] P. 426. Compare the discussion of the "austere manner" in which all "written instruments," including statutes, are said to be dealt with by the English courts, pp. 423–424.

[50] Pp. 400–402, 417–421.

[51] 6 Edw. VII, c. 58, §1.

[52] See *Tilling-Stevens Motors, Ltd.* v. *Kent County Council*, [1929] 1 Ch. 66, rev'd, [1929] A.C. 354.

[53] P. 401. The general problem is discussed by Professor Allen at pp. 400–402 and 417–418.

serious criticism a supposed rule of the English courts "that once a word or phrase has been given a certain judicial meaning, it is doomed to bear that meaning not only in all subsequent cases, but *in all subsequent statutes*."[54] While this seems an overstatement of the rule which the courts actually apply,[55] it must be admitted that judicial utterances give considerable colour to Professor Allen's broad proposition.[56] To an American lawyer, it seems a far cry, indeed, from such mechanical artificiality to the sensible approach to a similar problem in *International Stevedoring Co.* v. *Haverty*.[57]

Statutory interpretation in England is, Professor Allen thinks, pretty much of a nightmare for the judges;[58] it must be even more of a nightmare for those charged with the responsibility for the conception and drafting of legislation.[59] So long as courts not only reject the aid of legislative history but insist on literal construction as opposed to what has aptly been called "functional construction,"[60] statutory interpretation will, for them, be a dull and thankless task. But it need not be so. If the problem is conceived as that of ascertaining and carrying out the dominant purpose of the legislature where the words of the statute leave room for doubt as to its meaning,[61] and in the absence of evidence of that purpose "to suppose the Law-maker is present" and "give . . . such an answer as you imagine he would have done, if he had been present,"[62] statutory interpretation becomes a very different process than the barren exercise in logomachy which Professor Allen describes, I fear only too accurately.

[54] P. 419. The italics are Professor Allen's. This statement is said to be subject to the qualification that it applies "in the absence of a contrary intention" (p. 419, n. 1), but the author does not discuss the question of how that intention must appear.

[55] The statement of the rule in Maxwell, *Interpretation of Statutes* (8th ed., 1937), 270, relied upon by Professor Allen, is not nearly so broad.

[56] See *Ex parte Campbell*, 5 Ch. App. 703, 706 (1870); *Barlow* v. *Teal*, 15 Q.B.D. 403, 405 (1885); *North British Ry.* v. *Budhill Coal & Sandstone Co.*, [1910] A.C. 116, 127; *Barras* v. *Aberdeen Steam Trawling & Fishing Co.*, [1933] A.C. 402, 412, 438.

[57] 272 U.S. 50 (1926).

[58] See pp. 398–402, 427–428, 498.

[59] Compare Graham-Harrison, *An Examination of the Main Criticisms of the Statute Book and of the Possibility of Improvement* (1935), J. Soc. Pub. Teachers of Law 9, 35–39. For contemporary illustrations of the defeat of what would appear to be the obvious purpose of legislation by artificially literal construction, see two recent decisions under the Matrimonial Causes Act, 1937, 1 Edw. VIII and 1 Geo. VI, c. 57, §2—*Williams* v. *Williams*, [1939] P. 365, and *Astle* v. *Astle*, [1939], P. 415.

[60] See Davies, *The Interpretation of Statutes in the Light of their Policy by the English Courts*, 35 Col. L. Rev. 519, 525 (1935).

[61] The suggestion that this involves a hopeless attempt to discover an "undiscoverable" legislative intention, made in Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 869–872 (1930), seems to me sufficiently answered by Landis, *A Note on "Statutory Interpretation,"* *id.* 886.

[62] Plowden, *Note to Eyston* v. *Studd*, Plowd. (transl. 1779), 465, 467 (1578). Professor Allen regards Plowden's suggestion as "naive" (p. 374), and later characterises the suggested technique as a "fiction" (p. 411). Of course, what the court really does in such a case is to decide on legislative grounds, as it does in any other case of first impression. Professor Allen seems to recognise this, but rather dimly, when he says that the judge decides in such a case "according to his discretion and the general principles of logic and social policy in which he has been trained" (p. 497). The matter is put much better in Gray, *The Nature and Sources of the Law* (2nd ed., 1921), 172–173, or, for that matter, in §1 of the Swiss Civil Code of 1907.

There are signs that a different point of view is gaining ground in England;[63] but there is little evidence that it has yet affected the courts.[64]

Professor Allen's discussion of administrative law-making shows remarkable restraint for the author of *Bureaucracy Triumphant*.[65] Outside of some vigorous remarks on a recent tendency toward exempting such subordinate legislation from judicial review[66] and expressions of regret that the *Report of the Committee on Ministers' Powers*[67] has not had more effect,[68] the main emphasis is on the desirability of "a scientific system of administrative law."[69] Unfortunately the author does not enlighten us as to what the nature of such a system would be, except to suggest that there is no need for separate administrative courts on the continental model.[70] To the solution of the real problems of building the "scientific system" which he advocates, he makes no contribution.

Thus far I have not referred to the review of recent developments in juristic thought which forms one of the new features of the present edition of *Law in the Making*. Professor Allen has some valuable things to say about Ehrlich, whom he regards as the "most authoritative exponent of modern 'sociological jurisprudence,'"[71] and about Pound, although it seems somewhat odd to see Pound's sociological jurisprudence described as "Experimental."[72] There is a good critique of Kelsen[73] which points out that the "pure theory of law" of the Vienna School has set for itself an essentially "barren task."[74] There is, however, little of understanding in Professor Allen's treatment of the American realists, who at least have grasped, as he has not, the essential importance of studying law in action as well as the law of the books.[75] The characterization of the entire realist movement as "Jazz Jurisprudence"[76] may, I suppose, be interpreted as an attempt (somewhat dated) at humour; perhaps it might be more understandable if Professor Allen had seen an advance copy of the recent

[63] See, for example, Amos, *The Interpretation of Statutes*, 5 Camb. L.J. 163, 166–173 (1934); Davies, *supra* note 60; Jennings, *Courts and Administrative Law—The Experience of English Housing Legislation*, 49 Harv. L. Rev. 426 (1936); Laski, *Note on the Judicial Interpretation of Statutes*, in *Report of the Committee on Ministers' Powers*, Cmd. 4060 (1932) 135–137. Compare the gloomy forebodings in Holdsworth, *Some Makers of English Law* (1938), 294–298.

[64] But see *In re Insole's Settled Estates*, [1938] Ch. 812, and the comment thereon in Note, 55 L.Q. Rev. 2 (1939).

[65] 1931. See Laski, Book Review, 45 Harv. L. Rev. 754 (1932).

[66] See pp. 472–476, 500.

[67] Cmd. 4060 (1932).

[68] See especially p. 477, n. 1.

[69] P. 493.

[70] See p. 493, n. 1. Somewhat more detailed suggestions, relating to appeals from administrative decisions and costs on such appeals, are made by the author in *Bureaucracy Triumphant* (1931), 66–72.

[71] P. 30.

[72] P. 38. *Cf.* Beutel, *Some Implications of Experimental Jurisprudence*, 48 Harv. L. Rev. 169 (1934).

[73] See pp. 45–58.

[74] P. 51.

[75] Even so, Professor Allen's account of American legal realism is almost as satisfactory as the much longer discussion in Goodhart, *Some American Interpretations of Law* in *Modern Theories of Law* (1933), 1–20. For a much more understanding, and at the same time intelligently critical, treatment of this movement, see Fuller, *American Legal Realism*, 82 U. of Pa. L. Rev. 429 (1932).

[76] P. 45.

adolescent effusion of Professor Fred Rodell.[77] In any event, it is interesting to find that news of the jurisprudential discovery of America and the Continent has now reached Oxford.[78]

An American reader of Professor Allen's book will be almost certain to lay it down with a primary impression of the author's almost exclusive concern with the English law. There may be Common law in the Dominions and colonies and in the United States; the "Common law" is confined to England alone. Especially to American lawyers, such intense parochialism cannot but appear extreme. We have been made comparative lawyers within the ambit of the Common law system by necessity; Professor Allen, it seems, has been able effectively to preserve the virtues and the vices of legal insularity. But the book may well be mainly valuable because of this almost completely English character. The very defects which result from the author's lack of comparative background intensify the picture which the book gives of the way in which the original home of the Common law method and tradition has dealt with modern problems. Ossification of precedent, shackling of judicial creativeness in developing the law by decision, conflict rather than co-operation between courts on the one hand and legislature and administrative agencies on the other[79]—these and other diseases of one specific legal system are thrown into sharp relief by this study of the law of the original Common law jurisdiction. Indeed, the book seems, to an outside observer, to be itself a symptom of decadence, not merely in its conformity to an uninspiring tradition of uncritical acceptance or at most hesitating and half-hearted criticism of judicial utterance and decision,[80] but even more in its failure realistically to grapple with the larger problems of how "those agencies by which rules of conduct acquire the character of law"[81] are to operate justly and effectively. It exemplifies as well as describes diseases of legal senescence which the

[77] *Woe Unto You, Lawyers!* (1939), reviewed with undeserved (if slight) charity in Book Note, 53 Harv. L. Rev. 363 (1939). I must regretfully record the fact that the author of this piece of meretricious evanescence occupies a chair in an important American law school.

[78] Compare Stone, Book Review, 47 Harv. L. Rev. 721, 722 (1932).

[79] Compare the remarks of Stone, J., in *United States* v. *Morgan*, 307 U.S. 183, 191 (1939): ". . . in construing a statute setting up an administrative agency and providing for judicial review of its action court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim." See also 39 Col. L. Rev. 1406, 1410–1411 (1939).

[80] For a recent notable departure from this tradition, see Cheshire, *Private International Law* (1st ed., 1935; 2nd ed., 1938), and the reviews by Beale, 51 L.Q. Rev. 537 (1935), and Griswold, 51 Harv. L. Rev. 1127 (1938). Perhaps the high-water mark of the orthodox tradition is reached in a recent issue of the Canadian Bar Review, devoted to a consideration of the decisions of the Judicial Committee of the Privy Council on the validity of the Dominion social legislation of 1935, where it is said in an editorial foreword: "The present issue is designed neither as criticism nor commendation of the decisions of the Judicial Committee. *Either attitude would be an impertinence.*" 15 Can. B. Rev. following p. 392 (1937). The italics are mine.

[81] P. 1.

English bench and bar must cure if the future of the Common law tradition in England is to be other than dark. And it indicates, thought unwittingly, some of the therapeutic measures which will be necessary if the English Common law is to be restored to its earlier vigour.

That those measures will be taken once the clouds of war have cleared away can hardly be doubted. The Common law tradition is a tough tradition, and has survived worse times. The danger which Professor Allen's book suggests is that toughness has hardened to brittleness—that the power of the Common law to accommodate itself to new social and economic conditions and to absorb into itself the law made by the legislature, not as an alien intruder into a closed system but as a new basis of growth, has begun to atrophy.[82] But this is rather a danger to be avoided than an accomplished event to be regretfully recorded. The foreshadowings of a legal renaissance in England have, indeed, begun to appear. A new point of view toward statutory construction has been increasingly urged.[83] A dawning recognition of the possible significance of modern continental and American juristic thought has begun to manifest itself.[84] The founding of an English legal journal with the announced purposes of the *Modern Law Review*, moreover, seems in itself significant.[85] But perhaps the most significant evidence of renaissance has been the work of the Lord Chancellor's Committee on Law Revision since its creation in 1934.[86] In its eight interim reports there is to be found, it seems to me, much more of importance to one interested in English law in the making than in the circumscribed traditionalism of Professor Allen's volume. How far the activity of the Law Revision Committee represents the temper of the English bench and bar it is difficult for an outside observer to judge;[87] if it does represent that temper, surely a legal profession that can propose the substantial abolition of the doctrine of consideration,[88] the repeal of the Statute of Frauds,[89] and the substitution of the civil law rule of comparative fault for the time-honoured defence of contributory negligence,[90] has begun effectively to root out any seeds of decadence in the legal system which it serves.[91] We in America would be wiser, I suspect, to judge the

[82] Compare *Hurtado* v. *California*, 110 U.S. 516, 530 (1884): "This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law."

[83] See notes 63 and 64, *supra*.

[84] See *Modern Theories of Law* (1933), and review by Stone, 47 Harv. L. Rev. 721 (1934).

[85] See Editorial, 1 Mod. L. Rev., 1 (1937).

[86] See Foster, *Law Revision*, 2 Mod. L. Rev. 14 (1938); Notes, 1 *id.* 96 (1937), 3*id.* 154 (1939).

[87] Thus, Professor Allen does not discuss the work of the Committee, save for a casual and inadequate footnote reference (p. 265, n. 1). Nor, so far as I can discover, has its work ever been mentioned in the *Law Quarterly Review*.

[88] *Sixth Interim Report* (1937) Cmd. 5449, 12–30. Yet Professor Allen finds it "difficult . . . to imagine a statute enacting that consideration should not be necessary to a simple contract" (pp. 264–265).

[89] *Sixth Interim Report* (1937) Cmd. 5449, 4–12.

[90] *Eighth Interim Report* (1939) Cmd. 6032.

[91] On a comparable American agency of law reform, see Shientag, *A Ministry of Justice in Action: The Work of the New York State Law Revision Commission*, 22 Corn. L.Q. 183 (1937). Except for New York, the United States have been even more backward than England in undertaking systematic study and revision of their substantive law, although the need for doing so has been pointed out plainly enough. See Cardozo, *A Ministry of Justice*, 35 Harv. L. Rev. 113 (1921).

present state of English legal thought on the basis of the tempered iconoclasm of Lord Wright[92] or even the Voltairean reformism of A. P. Herbert[93] than from the nostalgic polemics of Lord Hewart[94] or the rigidities of the judicial process which *Law in the Making* describes. It may be that the growing point of the law has shifted in England, as it is tending to shift in the United States, from judicial creative activity to legislation and administrative action. If so, it is the methods, technique and substance of legislative and administrative activity which must increasingly become the concern of the English workers in the field of jurisprudence.

SIDNEY POST SIMPSON.*

[92] See Wright, *Ought the Doctrine of Consideration to be Abolished from the Common Law?* 49 Harv. L. Rev. 1225 (1936), and *The Study of Law*, 54 L.Q. Rev. 185 (1938).

[93] Compare Herbert, *Holy Deadlock* (1934), with §2 of the Matrimonial Causes Act, 1937, 1 Edw. VIII and 1 Geo. VI, c. 57.

[94] See Hewart, *The New Despotism* (1929). *Cf.* Dickinson, Book Review, 24 Am. Pol. Sci. Rev. 177 (1930). For an almost identical phenomenon in the United States, see Beck, *Our Wonderland of Bureaucracy* (1933). *Cf.* Laski, Book Review, 32 Col. L. Rev. 1449 (1932).

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STATUTES

The Emergency Powers (Defence) (No. 2) Act, 1940.

The powers conferred by the Emergency Powers (Defence) Act, 1939, and the Emergency Powers (Defence) Act, 1940, have frequently been exaggerated because not enough attention has been paid to the limitations expressed or implied in them. The former enables the King in Council to make such Defence Regulations as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order, and the efficient prosecution of the war, and for maintaining supplies and services essential to the life of the community. Among the limitations were, however, the following—

(1) Except within the narrow limits of section 2, there was no power to impose taxation, to authorise the issue of funds from the Exchequer, or to spend money.

(2) The Act was in force for one year only. It was prolonged for another year under the Act of 1940, and there was and is power to extend by parliamentary resolution. But in no case can action be continued after the end of the emergency, so that if power for long-term borrowing, or for confirming tenancies beyond the period of the Act is required, it must be given by Parliament.

(3) There was no power for the compulsory acquisition of the ownership of land (as distinct from the compulsory taking possession of land).

(4) There was no power to authorise the imposition of any form of compulsory naval, military or air force service.

(5) There was no power to authorise the imposition of any form of industrial conscription.

(6) There was no power to make provisions for the trial by courts martial of persons not subject to military law.

(7) There was no power to transfer or suspend the jurisdiction of the civil and criminal courts or to authorise the punishment of offences against the Defence Regulations otherwise than in the criminal courts.

The precise effect of the Emergency Powers (Defence) Act, 1940, is by no means clear. It is probable that it was of more importance as a political gesture—a defiance to Hitler's Germany and a demonstration of resolution by the British Parliament. The King in Council might under its terms require persons to place their property "at the disposal of His Majesty"; but they could already be compelled to do so under the Act of 1939. Presumably the Act would not be interpreted so as to authorise the compulsory acquisition of the ownership of land, which was the only exception to the power of requisition. The Act of 1940 also enabled the King in Council to require persons to place themselves and their services at the disposal of His Majesty. But compulsory military service, subject to limitations, had already been provided under the National Service (Armed Forces) Act, 1939, and powers of control over labour had been taken by the Control of Employment Act, 1939. It was perhaps more important that the power to amend legislation conferred by the Act of 1939 was extended by the Act of 1940 so as to permit the amendment of the legislation of 1939. The Act of 1940 therefore enabled the limitations on compulsory military service to be swept away (though in fact the power

has not yet been used), and gave a much wider power over labour than was provided by the Control of Employment Act, 1939 (which has been stated in the House of Commons to be obsolete).

Apart from the fourth and fifth limitations mentioned above, therefore, the restrictions on the Emergency Powers Act of 1939 remained. The purpose of the Emergency Powers (Defence) (No. 2) Act, 1940, was to abolish the last of the restrictions, so as to enable criminal justice to be administered by special courts in war zones, and to enable offences against the Defence Regulations to be punished in special courts. The original Bill was much wider, and would have authorised the trial of civilians by courts martial. Even so, the Home Secretary stated in the second reading debate that the necessary powers could be found in the first Emergency Powers Act. There is not the least doubt that either he was wrongly advised or he misunderstood the advice. There was an express exception about trial by court martial which could not have been held to have been swept away by the most generous interpretation of the Act of 1940. Further, the principle of *Chester* v. *Bateson*, [1920] 1 K.B. 820, that general words were not sufficient to deprive the subject of his right of access to the courts, was the one principle laid down under D.O.R.A. which was not expressly provided for by the Emergency Powers (Defence) Act, 1939. To suggest that a power to make Orders in Council for the defence of the realm, etc., would be regarded as a power to sweep away the criminal courts, and that a power to punish offences against the Defence Regulations included a power to set up special courts for the purpose, is to fly in the face of the whole tradition of the common law.

At the same time, it was clear that, in the event of invasion, the whole judicial system, like the whole administrative system, would break down in the invaded areas and for wide areas outside. Civil administration is provided for by the Defence Regulations and the powers of delegation to Regional Commissioners and otherwise there conferred. Judicial administration was unprovided for except by the common law powers commonly spoken of as "martial law." It was made clear in the House of Commons that, where military operations are actually in progress, the military authorities will exercise martial law. It is assumed, however, that there might be areas in a sort of no man's land between ordinary law and martial law, where something more rapid and effective than ordinary judicial administration would be necessary. Also—though this was not expressly said in the House of Commons—small bodies of troops landed by air might be able to hold up the leisurely process of the ordinary criminal courts. The second Act of 1940 is designed to cover this intermediate stage between ordinary administration and complete military government.

It is essential to emphasise that the new Act covers two distinct points. In the first place, it enables the ordinary administration of criminal justice to be placed in the hands of special courts. Here there is a very substantial restriction, because the power may be exercised only "where by reason of recent or immediately apprehended enemy action the military situation is such as to require that criminal justice should be administered more speedily than would be practicable by the ordinary courts." This is a real restriction, because it is not provided that the power may be exercised when somebody in office is "satisfied" that the conditions exist. The conditions must really exist: that is, when the ordinary courts are open it will be possible to challenge the decision of the special court by prerogative writ or order on the ground that the Order in Council was invalid by reason of

the non-existence of the conditions. It is also provided that the special court must not be a "court martial." But what is a court martial? Clearly a military court under the Army Act or the Air Force Act is a court martial. But is a specially constituted court of military officers a court martial?

In the second place, the Act provides for the trial by special courts of offenders against the Defence Regulations. It is necessary to emphasise the distinction between the two powers because this power is not restricted to the conditions laid down for the transfer of ordinary criminal justice. In other words, it is possible here and now, whether invasion is contemplated or not, to take away from the ordinary criminal courts the trial of offenders against the Regulations. Since it is in fact possible to cover most of the criminal law, and to go far beyond it, by Defence Regulations, the restriction imposed on the other power is really illusory. There is hardly any criminal offence which cannot be said to be "necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of the war." Also, it is necessary only that it should appear to the King in Council that it is so. Accordingly, any criminal offence can be converted into an offence against the Defence Regulations and so tried by a special court at any time. It is true that there are limitations. The special court must not be a court martial. Also, a death sentence must be reviewed by not less than three persons who hold or have held high judicial office.

This is, therefore, a wide and dangerous power, and it is a great pity that the House of Commons did not insist on the insertion of additional precautions. Nevertheless, the danger must not be exaggerated. The present writer has long contended that the traditional view of the judicial protection of civil liberties, as stated for example by Dicey, has been fallacious. The mere fact that law has to be applied by "ordinary courts" is not a protection. Three things are necessary—

(1) The law itself must be just. Clearly, under our Constitution the law can provide no protection against bad law. We must depend on Parliament. It is possible, however, for Parliament to insert restrictions where power is given, as under the Emergency Powers Acts, for the creation of offences by delegated legislation. There is no such protection in the Emergency Powers (Defence) Act, 1939; but the latest Act in this respect does not alter the situation.

(2) The administration of the law must be impartial. In other words, the law must be applied properly. Now, there is no absolute certainty that a special court will apply the law less impartially than the "ordinary courts." We can trust the High Court judges and, presumably, the borough recorders and the paid chairmen of quarter sessions. Can we trust justices of the peace, whether in courts of summary jurisdiction or in quarter sessions? Moreover, at quarter sessions and on assizes the question of guilt is (subject to emergency legislation) for the jury. The old dependence upon the jury in political matters is surely quite fallacious. Dicey's "twelve shopkeepers" are the last tribunal that any person accused of Fifth Column activities would choose if he had a choice. The old favourable tradition about juries is due to the fact that juries were often more representative of popular opinion than the House of Commons or the Government. Particularly was this true of a London or Middlesex jury, which was certain to be more "popular" in the strict sense than the Government, at least until 1832. Whigs and dissenters were protected against Charles II

and James II by London juries (as in Bushell's Case). During and after the French wars the repressive action of Tory Governments was resisted by juries composed of Whigs and dissenters. Since the extension of the franchise, however, the position has been reversed. A middle-class jury is no protection to a person who does not share the prejudices of the middle class. Nevertheless, the defects of the ordinary courts are known, while the composition of special courts is left in the hands of the Government. Parliament ought to have insisted upon particular qualifications for the members of these tribunals. However, the real protection rests in the House of Commons itself. So long as the House meets and maintains its vigilance, there is no real fear that the power will be abused.

(3) The most important requirement is, however, that the discretion as to punishment shall be exercised justly. It is really astonishing that so little emphasis has been placed upon the importance of the proper exercise of judicial discretion. There would be great danger to liberty if it were still possible to have a Scroggs or a Jeffreys on the bench; and those who have drawn lessons from the refusal of juries to obey the law have failed to draw lessons from the administration of the Game Laws. To-day, a court of summary jurisdiction usually has a complete discretion ranging between dismissal under the Probation of Offenders Act and six months' imprisonment, while the range of discretion of a superior criminal court may be from dismissal to imprisonment for life. Only where the death penalty is provided for is there no discretion, and it is precisely in this case that the 1940 Defence Act (No. 2) requires judicial review. The most dangerous part of the Act, in the writer's opinion, is that any ordinary court may be superseded by any kind of special court, other than a court martial, and that no appeal or review is provided for except where the death penalty is ordered under Defence Regulations.

However, it is unwise to forget the primary political check. So long as the House of Commons sits it is unlikely that the powers can be seriously abused. It was not necessary to confer such wide powers, but there is no great danger that they will be abused. The Act was passed not merely to deal with the present situation, but also to avoid part of the necessity for "martial law" if conditions become more difficult. The Regulations at present in force, in fact, give full protection. The Defence (War Zone Courts) Regulations, 1940 (S. R. & O., 1940, No. 1444), apply to the administration of criminal justice under the Defence Regulations the limitations which apply under the statute to the transfer of ordinary criminal jurisdiction. That is, the Minister of Home Security is empowered to establish the special courts only where "by reason of recent or immediately apprehended enemy action the military situation is such that criminal justice cannot be administered by the ordinary courts with sufficient expedition." The courts of summary jurisdiction are not to be superseded unless a special tribunal so orders in any particular case. The president of the special court will be appointed by the Lord Chancellor and must be a judge of the Supreme Court or be qualified to be a commissioner of assize. He will hold office on the same tenure as a puisne judge of the High Court. He will be assisted by two "advisory members" chosen by him from a panel of justices of the peace set up by the Secretary of State. Decisions will be taken by the president after consultation with the advisory members. Moreover, review is provided for not only where sentence of death is passed (whether under the ordinary law or under the Defence

Regulations), but also where penal servitude for a term of seven years or more is imposed, or where the president certifies that the case is of special difficulty, or where the Secretary of State thinks review desirable. The persons by whom review will be exercised will be appointed by the Lord Chancellor, must have held high judicial office, and will have the powers of the Court of Criminal Appeal.

These provisions are admirable. If it proves possible to maintain them through the vicissitudes of the defensive part of the war, we may justly feel pleased with ourselves. They are so admirable that one wonders why the Act was passed in such wide terms. No doubt the answer is that it will not be possible to maintain them if invasion is successful enough for fighting actually to occur on English soil. In that case, however, it seems doubtful whether Orders in Council will be of much avail. In the last resort the military authorities may have to fall back on "martial law."

20th August, 1940. W. Ivor Jennings.

The Finance Act, 1940

A detailed examination of the provisions of this Act would hardly be within the scope of this Journal. The increased rate of income tax, 7s. 6d., fixed by the Finance (No. 2) Act 1939 is continued while the rate of the Excess Profits Tax is increased to 100 per cent. as from 1st April, 1940; in this latter regard, it must be observed that the burden of the tax will, in view of the allowance for increased capital, rarely approach the full 100 per cent. of the excess profits. This is because the taxpayer is allowed to increase his standard profit by 8 per cent. of the difference between the average capital employed in the chargeable accounting period—this includes profits actually accumulating in that period—and the capital similarly employed in the standard period. The provisions relating to the Excess Profits Tax are mainly concerned with inter-connected companies which are, in effect, treated as one concern; the ramifications of modern industry are so involved that a schedule of eighteen pages is needed to effectuate this purpose. In addition, provision is made for a special standard for those businesses making very small profits in the pre-war years or forming part of a depressed industry and also for relief in respect of payment of Excess Profits Tax both here and in the Dominions; the other provisions relating to this tax are of a highly technical character more fitted for discussion in accountancy journals. As regards Estate Duty, a series of involved sections stops up yet another hole in the taxation net which has been found by the perverse ingenuity of the legal profession; one can only look forward to the day when the legal and accountancy professions will regard it as unethical—nay, rather, as unprofessional conduct—to encourage the well-to-do to throw undue burdens on their fellow citizens by indulgence in such civic vices as "legal avoidance of tax."

From the purely legal aspect, the Finance Act, 1940, is most interesting on the Income Tax side since a number of sections have been introduced to nullify decisions of the House of Lords which have led to income, in the true sense of the word, escaping taxation by reason of peculiarities in the schedular classification of income which date back to Pitt's Income Tax Act of 1806. The writer of this note suggested some time ago—1 M.L.R. 293/4—that income from property which escaped tax because it could not be brought within the very strict wording of "Schedule A" should, as

regards any untaxed excess income, be specially included in the so-called "sweeping-up" clause of Schedule D, viz. Case VI; this would, of course, mean undoing the decisions of the House of Lords in *Salisbury House Estates, Ltd.* v. *Fry*, [1930] A.C. 432 and *Whelan* v. *Leney & Co. Ltd.*, [1936] A.C. 363, discussed at 1 M.L.R. 82. Sections 13 to 18 of the Act provide a code to deal with these excess rents; if payable under short leases, i.e. those granted for terms not exceeding fifty years, the excess of the income not charged under Schedule A is to be assessed to tax under Case VI, Schedule D, while income arising from long leases, i.e. exceeding a term of fifty years, is dealt with by retention on the lessee who becomes liable to account to the Revenue—under Rules 19 and 21 of the All Schedules Rules, Income Tax Act, 1918—for the tax so deducted therefrom.

Garland v. *Archer-Shee*, [1931] A.C. 262 held that income arising from foreign trusts, consisting of stocks, shares, property, etc., was assessable—where the law relating to trusts could be considered similar to English law, as to which see *Archer-Shee*, v. *Baker* [1927] A.C. 844—not upon the income arising abroad (Case V, Sch. D, Rule 1) but only upon the income actually remitted to this country (Case V, Rule 2); Sec. 19 of the Act provides that all income arising from possessions out of the United Kingdom, which term includes foreign trust-funds, shall be charged on the amount arising there, whether or not remitted to this country—save income immediately derived from a business or employment wholly exercised abroad. As was forecast in the note at 3 M.L. R316/7 on *Cull* v. *Inland Revenue*, [1940] A.C. 51, the decision of the House of Lords has been reversed by legislation as is another of their decisions, viz. *Hughes* v. *National Bank of New Zealand*, [1938] A.C. 366; this latter case allowed a non-resident carrying on an investment, banking, or insurance business in this country to charge against his profits the whole of his expenses relating to income which was statutorily exempt from income tax, e.g. under Sec. 46 Income Tax Act, 1918. Sec. 21 of the current Act puts this anomaly right by, in effect, disallowing all expenses which relate to income not liable to tax. Sec. 22 of the Act voids the decision in *Union Cold Storage Co. Ltd.* v. *Ellecker*, [1939] 2 K.B. 440, which allowed the lessee of plant and machinery to claim a deduction for the wear and tear thereof though none of the actual burden of depreciation fell upon or was borne by him. When *Stevens* v. *Tirard*, [1939] 4 All E.R. 186 was before the Court of Appeal, Clauson, L.J., pointed out that the anomaly by which, in the case of divorce, *both* parents could claim the allowance in respect of children was one which could only be put right by legislation; Sec. 24 of the Act does this by providing that, in such cases, only one allowance is to be given, apportioned according to the provision made by each of the parties for the child or children.

A. Farnsworth.

NOTES OF CASES

Extent of Solicitor's Responsibility for Conduct of Clerks

A solicitor is an agent remuneratively employed about his principal's affairs, and under the obligation to do his best to further the principal's interests. But he is also an officer of the Court, and therefore responsible for strict observance of the Court's requirements as regards observance of rules, respect for the policy of the judges, and in other ways which the Court may indicate from time to time. It does not require much reflection to see that there lies in these two aspects of professional work the possibility of serious conflicts of duty. Such difficulties undoubtedly arise from time to time during the career of most solicitors, and indeed barristers, though here they are naturally less frequent. On the whole the standard of conduct in the profession is high and there can be little doubt that the majority of solicitors conduct their clients' business with a due regard to their position as officers of the Court. There are, of course, wide divergencies of education and social background among solicitors which undoubtedly give rise to variations in standards. Moreover much of the most troublesome work, from a moral point of view, which has to be done in a solicitor's office is entrusted to unadmitted managing clerks. Anybody with experience of litigation will be aware that among these men there is a not inconsiderable proportion whose standards are not so high as their abilities. Unscrupulous conduct and even shady practices are only too frequent among this section, and temptation is frequent. It is consequently of very great importance that their employers should supervise their work closely and impress upon them the necessity for strict observance of all the Court rules and requirements. They are much more likely to do this if they are held personally responsible to the Court for the actions of their clerks, and also to third parties who may suffer pecuniary loss as a result of misconduct of such clerks. *Myers* v. *Elman* (1940), A.C. 282, in which the House of Lords considered the extent of a solicitor's liability in this respect is therefore worthy of very careful study.

The respondent Elman had represented certain defendants in an action for damages for fraudulent conspiracy. As in all such actions the question of discovery of documents turned out to be of vital importance, and great difficulties arose in securing proper discovery from the defendants. The detailed conduct of this part of the case was entrusted by the defendant to his clerk, one Osborne, who was not a solicitor. Difficulty arose over the disclosure of items in the pass book of one of the defendants, and Osborne sealed up a considerable number of highly relevant entries. Eventually this particular defendant did not appear at the trial, and it became obvious that he could not be good for any of the damages. The plaintiff accordingly applied to the trial judge for an order against Elman that he should pay his costs of the action on the ground that he had been guilty of professional misconduct through the acts of Osborne. The trial judge made the order asked for, holding that Osborne had knowingly prepared a false affidavit of documents, and that Elman was responsible for such conduct.

On appeal, however, the majority of the Court of Appeal were of opinion that the jurisdiction of the Court to order a solicitor to pay costs personally is a punitive power resting on the personal misconduct of the solicitor. They accordingly discharged the order. In the House of Lords, however, their lordships were unanimously of opinion that the jurisdiction of the

Court goes much further than this. It would appear, though this is my own inference, that the Court may in the exercise of its jurisdiction over its own officers order them to pay the costs whenever it thinks fit. When the conduct complained of is not that of the solicitor personally, but that of an employee, the solicitor will be held responsible when it is of a criminal or fraudulent character, or amounts to gross negligence. Ordinarily, however, the solicitor will not be held responsible, under this jurisdiction, for a mere mistake or error in judgment (per Lord Wright at p. 509). According to Lord Wright also (*ibid*) "the jurisdiction is not merely punitive but compensatory." This is an important, and perhaps a new principle: it opens up considerable possibilities of claims against solicitors founded in negligence, for there is a considerable borderland between gross negligence and mere errors of judgment, moreover even in these latter cases the remedy is not completely barred.

Some of the speeches are important for the light they throw upon the scope of the solicitor's duty in connection with discovery. There is no aspect of procedure which gives rise to more unscrupulous conduct than discovery, for success or failure in keeping back a particular document is often the difference between victory or defeat. It is therefore especially important that the solicitor should know where he stands in this matter. It is now perfectly clear (see e.g. per Lord Maugham (at 491)) that the solicitor, or his subordinate, must take an active part in the discovery, not leaving it to the other side to ferret out the documents, nor must he be content to give general advice to his client leaving the actual onus upon him for the selection of documents, and if he has any doubts as to what his client has done "he must investigate the matter" (per Lord Atkin at p. 499). In cases where there is a charge of fraud the responsibility is particularly great "for a wilful omission to perform his duty . . . may well amount to conduct which is aiding and abetting a criminal" (*ibid*). Lord Maugham condemns the tactical use of the procedure of discovery for the purpose of delaying proceedings, which is a very common trick (see p. 491), and it may well be the future policy of the Court to discourage this sort of thing by using its jurisdiction to mulct solicitors in costs where there has been unnecessary fencing.

Finally, it may be noted that one of the charges against the respondent was that he had filed a defence putting the plaintiff to the proof of her allegations of fraud when he knew that such a defence could not succeed. On the facts of the case the trial judge held that there was no misconduct in this regard. There is, however, no finding that in a proper case such conduct might not be penalised. This opens up very important possibilities. Defences are in fact often filed for mere purposes of delay, and in order to frighten the other side by the prospect of having to incur heavy costs in bringing evidence. If the Court could stop this sort of thing by making use of this jurisdiction it would be a useful step in expediting and cheapening justice.

R. S. T. C.

Incidence of Liability for Nuisance

The House of Lords has now set the seal of authority to the doctrine formulated in Salmond's Law of Torts[1] and developed by the Court of Appeal in a series of decisions.[2] The gist of it is that no one is liable in nuisance unless he either has created the nuisance, or, when it has been created

[1] *Cf.* 9th ed., p. 245.

[2] For an enumeration of which see Mod. L. R., vol. III, p. 306, *et seq.*

by the act of a trespasser or otherwise without the authority or permission of the occupier, unless he suffers it to continue without taking reasonably prompt and efficient means for its abatement. In other words, the liability for nuisance is conditional upon the defendant having acted either wilfully or negligently in regard to it.

In *Sedleigh-Denfield* v. *St. Joseph Society for Foreign Missions* (1940), 3 A.E.R. 349, the House of Lords reversed the decision of the Court of Appeal, not on the principle as just formulated, but on the evaluation of the facts. The respondent College was the owner of property adjoining the appellant's premises, a ditch and hedge forming the boundary. When a block of flats was erected on the appellant's premises, the ditch, at a place where it belonged to the College's property, had been piped in by the county council. No permission was sought from the college, nor was the fact otherwise brought to its notice. A member of the respondent college, however, cleaned the ditch at least twice a year. He saw the work in progress but did not report it to his superiors, assuming that consent had been obtained. The county council omitted to put a proper guard at the entrance to prevent its being blocked by debris. The pipe became blocked, and about three years after its construction the appellant's garden was flooded as a result of this. Appellant sued for damages.

The Court of Appeal held that, in these circumstances, the respondents were not liable, as the nuisance had been created by the act of a trespasser and, in cases of private nuisance, mere failure to remove the nuisance did not involve the occupier in liability. The principal authority for this view was the majority decision in *Job Edwards Ltd.* v. *Birmingham Navigations* (1924), 1 K.B. 341, where the occupiers refused to extinguish a fire started by a refuse heap carried on their land without their consent. The House of Lords, on the other hand, held that, as nearly three years had elapsed before the garden was flooded, and a person authorised by the respondents was in charge of the ditch, the respondents had the knowledge or the means of knowledge of the nuisance and suffered it to continue without taking reasonably prompt and efficient means for its abatement. The House adopted the view expressed by Scrutton, L.J., in his dissentient judgment that no difference could be made between public and private nuisances, as far as the incidence of liability for ensuing damage was concerned, and that it was the duty of an occupier to remove a nuisance on his land, of which he knew or reasonably ought to have known.

Too much seems to have been made of the difference of view between the majority and Scrutton, L.J., in *Job Edwards'* case. As has been pointed out before, in this Review (Vol. I, p. 48, n. 12), there was no difference as to the question of principle that liability depended on wilfulness or lack of care. The difference was confined to the extent of an occupier's duty of care in regard to a nuisance caused by a trespasser. It is to be welcomed that, in accordance with the steady strengthening of the responsibility of those in control of property, the House of Lords has adopted the more stringent view of Scrutton, L.J. But on the principle, namely the rejection of strict liability for nuisance caused outside the occupier's sphere of control the Court of Appeal has been insistent and consistent in a series of decisions which have been collected in a previous number (p. 305 *et seq.*). It is perhaps a slightly misleading note in Salmond (9th ed., p. 246 (*c*)) which has caused the discussion on the *Job Edwards* case to take this turn (*cf.* Mod. L.R., vol. I, p. 48).

On another point the decision of the House of Lords confirms a

development noted in the comments of *Wringe* v. *Cohen* in a previous number (p. 305 *et seq.*), that there is no difference between public and private nuisance, as far as liability for damages is concerned. Damage caused by public nuisance is, in fact, a case of private nuisance.[3]

Apart from, first, the welcome confirmation of a doctrine of law which has been fully developed by learned writers and the Court of Appeal, for a number of years, second, the assimilation of cases of public and private nuisance, and third, the stricter interpretation of the duty of supervision which an occupier of land ought to exercise over the property, as Scrutton, L.J., had suggested, the actual decision contains nothing new in principle.

Lord Maugham and Lord Wright, however, took this opportunity to make some observations on the relations between nuisance and some other torts. Lord Maugham said that, in his view, the principle of *Rylands* v. *Fletcher* did not apply to the present case, since it "relates only to cases where there has been some special use of property bringing with it increased danger to others, and does not extend to damage caused to adjoining owners as the result of the ordinary use of the land: *Rickards* v. *Lothian*, [1913] A.C. 280. Lord Wright observed that the present case had a certain similarity with those to which the rule in *Rylands* v. *Fletcher* applied, but that there were well-marked differences between the two juristic concepts. The claim also had affinity with a claim for negligence, but the gist of the present action was the unreasonable and unjustified interference by the defendants in the user of their land with the plaintiff's right to enjoy his property. Negligence, moreover, was not a necessary condition of a claim for nuisance. "What is done may be done deliberately and in good faith, and in a genuine belief that it is justified. Negligence here is not an independent cause of action, but is ancillary to the actual cause of action, which is nuisance."

Despite the progressive spirit which the House of Lords has displayed on so many occasions in recent years, it was not to be expected that it would, on this occasion, frankly declare that, in view of modern developments, ancient distinctions between a number of forms of actions surviving as special torts have become meaningless. But the above quoted observations, it must be admitted with great respect, seem rather unhelpful. Of such distinctions which may exist between Nuisance and *Rylands* v. *Fletcher*, that between ordinary and extraordinary or natural and unnatural user of land is the most questionable. As has been made clear by decisions like *Christie* v. *Davey*, [1893] 1 Ch. 316, and *Hollywood Silver Fox Farm* v. *Emmett*, [1936] 2 K.B. 468, ordinary reasonable user of land[4] would not be actionable in nuisance, as falling under the "give and take" rule of *Bamford* v. *Turnley*, [1860] 3 B. & S. 62, and only malice would make such user of land "unnatural" and therefore actionable. Professor Winfield, who has devoted special attention to the relation of the rule in *Rylands* v. *Fletcher* to Nuisance[5] finds that essentially the former is a species of the latter, and many cases could and have been based alternatively on the one or the other. He classifies, however, ten points of difference, none of which, it is respectfully submitted, justifies the separate survival of both forms of action. To deal briefly with these ten points—

1. Certain nuisances, like obstruction of highways or defective fencing, are certainly outside the rule of *Rylands* v. *Fletcher*, but that does not

[3] Winfield, *Law of Tort*, pp. 466/67.

[4] And that since *Rickards* v. *Lothian* and *Collingwood* v. *Home and Colonial Stores* (1936), T.L.R. 53, is the meaning of "natural user."

[5] 4 Camb. L.J., 194–197; Law of Tort, § 146.

prevent all cases in which the rule in *Rylands* v. *Fletcher* has been applied, from being a species of nuisance, and therefore part of a wider principle.

2. That the rule in *Rylands* v. *Fletcher*, unlike Nuisance, is not confined to injuries affecting the use or enjoyment of land, is not correct, if we include damage caused by public nuisance as a case of nuisance, as we must do, after the present decision, and in accordance with Professor Winfield's own contention.

3. There is no reason why a *quia timet* injunction should not be granted in a *Rylands* v. *Fletcher* case as well as in a nuisance case. Moreover, this as well as points 4 and 5 (No legalisation by prescription in *Rylands* v. *Fletcher* cases, and Act of God as a defence peculiar to *Rylands* v. *Fletcher*), do not relate to the substance of the action, but to differences in legal defences and consequences, on the assumption that they are different in substance. Further, the differences between Act of God and inevitable accident has shrunk to insignificance, since, after *Nichols* v. *Marsland*, no defence based on Act of God has ever been successful.

6. That liability under the rule in *Rylands* v. *Fletcher* requires occupation, or at least some franchise over the land, is true, if a mere licence, as in the *Charing Cross Electricity case*, [1914] 3 K.B. 772, or in *Shiffmen* v. *Order of St. John*, [1936] 1 A.E.R. 557 be regarded as a franchise. But a licence is a mere personal right.

7. That the defendant in nuisance is not liable for the torts of an independent contractor, would seem to be definitely incorrect, after the decision of the Court of Appeal in *Matania* v. *National Provincial Bank*, [1936] 2 A.E.R. 638, which held the defendant liable for a nuisance committed by a contractor, in the course of and incidentally to the work which he was instructed to do.[6]

8. How far unusual sensitiveness of the plaintiff's property is a defence in *Rylands* v. *Fletcher*, is doubtful, according to Professor Winfield himself. Probably damage done through unusual sensitiveness would always make the use of the defendant's property a normal one and thus constitute a good defence. No thing is likely to do mischief if it escapes, if the mischief is only due to unusual sensitiveness of the plaintiff's property.

9. The difference stressed by Lord Maugham, regarding natural user, we have already discussed. The dangerous character of the object required in *Rylands* v. *Fletcher* is to-day a matter of pure theory, since recent decisions and discussions have made it abundantly clear that any object nowadays may become dangerous through the circumstances and manner of its use.[7]

As for the relation of Negligence to Nuisance, it is certainly possible to detect a theoretical difference, as long as a system of specific and separate torts is maintained. Negligence is an independent tort, but in nuisance negligence is an incidence of liability "ancillary to the cause of action." But it is difficult to see the relevance of the observation that in nuisance "what is done may be done deliberately and in good faith, and in a genuine belief that it is justified." Neither deliberation nor good faith nor belief in the justification is a good defence in any tortious action provided the action or omission interferes with a protected interest of the plaintiff, and unless malice is required. Does good faith save the manufacturer from liability for the defect in the product turned out by him? Does it save the

[6] On this whole question, see "Modern Trends in the Law of Tort," Mod. L. R. I, 53 *et seq.*; Chapman, 50 L.Q.R. 7.

[7] *Cf.* Stallybrass, 3 Camb, L.J., pp. 378–*et seq* and in Salmond, s. 141.

newspaper proprietor, in cases like *Hulton* v. *Jones* or *Cassidy* v. *Daily Mirror*? It is, of course, commonly said that reasonable care does not protect from liability in nuisance. But that obviously relates to the objective element of "give and take." If the use of one's property is more than the neighbour must reasonably tolerate, the defendant is liable, provided the nuisance is within his control, that is either committed deliberately or tolerated, in the manner finally clarified by the present decision. This is nothing different from the *risque ovée* which is the essence of modern liability in negligence. (Salmond, 9th ed., p. 609.)

Such other differences as Professor Winfield detects (Tort, p. 500/01) relate again either to defences (contributory negligence) or resolve themselves into a different way of stating what interference is unlawful. In Negligence the question is put as "duty of care" which, in reality, as Professor Winfield himself shows in another part of his book, means nothing but how the defendant ought reasonably to behave towards the plaintiff, in nuisance it is put as the question what use of property by the defendant the plaintiff must reasonably tolerate. There is no difference of substance.

The fact is beyond doubt that judges, litigants and students are increasingly bewildered by the choice between actions. *Wilchick* v. *Marks* (1934), 2 K.B. 56, *Northwestern Utilities* v. *London Guarantee Co.* (1936), A.C. 118, and the present case, in which Mackinnon, L.J., complained of the framing of the same claim first in nuisance, then in negligence are recent examples of the confusion.

It is always possible to find technical differences between forms of action, by taking up their history and following up the differences in their development. But what relevance has that to their present function? Surely the task of the law is to provide clear principles which are in accordance with the notions of justice of the time and which are as simple as possible for the benefit of those who come to the law and those who have to find it. Perhaps it is better to approach our problem from the opposite angle and ask—

Assuming there were a general formula, akin to those used in continental codes to the effect that the defendant is liable for the wilful or negligent interference with an interest of the plaintiff protected by the law, would it cover the cases of Negligence, Nuisance and *Rylands* v. *Fletcher*? The ananswer is Yes. What interests are protected, each system of law decides according to its own ideas, and the different tort actions give us a clear idea as to the interests of life, bodily and moral integrity, property and contract which English legal policy protects at present. As has been pointed out repeatedly in this Review (*cf.* Vol. I, p. 39 *et seq.*, vol. III, p. 309, and *cf.* particularly Dr. Stallybrass in Salmond, Torts, 9th ed., s. 149) the modern test of negligence is such as to impose liability whenever damage has been caused in a manner which is not outside the defendant's control, and it has also been shown that the various defences, like act of a trespasser, latent defect, inevitable accident, Act of God, etc., all express this same principle.

A large part of the law of tort would be covered by this, and the Courts would substantially do the same as they do now, without having to bother about minute distinctions between one or the other specific action.

Why worry about all this? The answer seems to us to be that law, as an essential, though largely autonomous part of government and administration, has to satisfy the requirements of good government. It must be simple, comprehensible, sufficiently general and elastic to enable Courts

to deal with the infinite complexities of modern social life. The maintenance of a hypertrophy of torts, with the corresponding waste of mental energy in maintaining and elaborating more and more meaningless distinctions which can give no one except a few academic lawyers any satisfaction, is a luxury which no modern body politic, certainly not an England at war, can afford. England could not to-day be defended by the longbow of Crécy and Agincourt, nor by Nelson's frigates. Social technique aims at economy of effort. The principles underlying the law of tort are a matter of legal policy, and we may find that as far as the basic principles are concerned, we are closer to-day to the principles of the Middle Age than to those of the nineteenth century. But the legal technique required in 1940 is, indeed, as different from that of centuries ago as modern warfare from the knightly deeds of the Crusades.

W. FRIEDMANN.

Amenities and Property Rights

One of the most significant aspects of modern social life is the increased importance attached to what may be called public amenities. So much is this so that an appreciable proportion of the legislative output is now devoted to their furtherance or protection. This legislation inevitably cuts into what used to be called the "sacred rights of property." Individual rights in property are still of enormous importance, too much so, as many of us think. It would however be absurd to ignore the fact that the position has in a number of respects changed radically from that which existed at the time when the Industrial Revolution laid its blighting hand upon the fair face of England.

Numerous illustrations of this could be given from Town and Country Planning Acts, from Road Acts, from Public Health Acts, and other statutes. It is not perhaps adequately reflected in the reported cases since decisions upon such statutes are largely administrative in character. In the result therefore the average lawyer is often somewhat ignorant of the very considerable changes in the law which have come into existence during the last twenty years. An excellent illustration of this tendency has occurred recently in *Rex* v. *Recorder of Bolton: ex parte McVitie*, [1940] 1 K.B. 290.

The facts of the case were shortly that the appellant owned a cinema theatre built upon a prominent site in the large industrial town of Bolton. In 1930 it was burned down; steel stanchions and debris, which were left upon the site, constituting in the words of Scott, L.J., "a dreadful eyesore." For six years the owner did nothing about it, "the sacred rights of property" entitling him to inflict this aesthetic horror upon his fellow citizens—"disfiguring the neighbourhood at the expense of the inhabitants." But in 1936 the Public Health Act of that year conferred a new power upon a local authority, namely to apply to the magistrates for an order to the owner of a structure which "by reason of its ruinous or dilapidated condition is seriously detrimental to the amenities of the neighbourhood," that he should either repair and restore the structure, or demolish it and remove the remains (s. 58). On the application of the local council at Bolton the recorder made such an order, against which the owner appealed, unsuccessfully, first to a Divisional Court, and then to the Court of Appeal. His argument was that the order of the recorder was not sufficiently clear in its terms in that it did not specify the exact works which had to be done in order to restore the structure. No doubt if the

recorder had attempted the impossible task of going into details his order would have been attacked on the ground that the section did not give him power to make such an order. There are of course sections in the Public Health Acts dealing with the abatement of nuisances which call for explicit directions, but any attempt to apply such a method to this part of s. 58 would clearly make the application of the section impossible. Scott, L.J., recognises this in his judgment (see p. 295) when he says, "in my view the Divisional Court was absolutely right in refusing to have the interpretation of this very valuable new section cut down by decisions on a wholly different type of section."

S. 58 is headed "dangerous or dilapidated buildings and structures," a title which sufficiently indicates its origins. Even in early Victorian England the Common Law gave remedies to persons suffering damage from dangerous buildings, and the earliest Town Improvements Clauses Act of 1847 contained powers to magistrates to order the demolition of dangerous buildings before damage actually resulted to third persons. It was found, however, that very often the owner demolished the building without removing the debris, leaving the site no longer dangerous but often a nuisance and an eyesore (see Lumley: *Public Health*, 11th edition, Vol. I, p. 183 n.k.)). It accordingly became usual to insert in the special acts of local authorities a section giving the authority power to require the removal of snch rubbish, and this is now made general by s. 58 of the 1936 Act. That it should have been found necessary to go to these lengths in crossing t's and dotting i's shows how tenacious property owners are.

Finally, it is perhaps worth noticing that the authors of the standard commentaries upon the Public Health Acts such as Lumley and Jennings do not call attention to the importance of the innovation contained in s. 58 whereby the legislature passes from a mere regard for the safety of life, limb, and property to a solicitude for the spiritual side of the life of the citizen, an omission only too characteristic of the lack of interest taken by the profession in matters of this kind.

R. S. T. C.

Articles of Association and Contractual Rights

The decision of the House of Lords in *Southern Foundries* (1926) *Ltd. and Federated Foundries, Ltd.* v. *Shirlaw*, [1940] 2 All E.R. 445, is likely to become a leading authority on the intricate question to what extent contractual rights against a company are immune from interference by changes in the articles of association. The case which is also very remarkable for the light it throws on certain features of the law of contracts offers the spectacle of an alignment of Equity against Common Law Judges, or, perhaps more correctly, of a struggle between Company Law and the law of contracts.

In December, 1933, the plaintiff was appointed managing director of Southern Foundries (1926) Ltd. "for the term of 10 years from Dec. 1, 1933." The articles of association empowered the directors to appoint any one of their body to be managing director for such period and upon such terms as they thought fit, "subject to the same provisions as to resignation and removal as the other directors of the company," this, however, "subject to the provisions of any contract between him and the company." The provision as to resignation was that the office of director was to be vacated "if he gives the directors six months' notice in writing that he resigns his office," and those as to removal (apart from special

cases, like loss of qualification shares, non-attendance of board-meetings, etc.) gave the company an unqualified and overriding power to remove any director by extraordinary resolution before the expiration of his period of office.

Two years after the plaintiff's appointment, the company decided upon a "merger" with about ten others engaged on similar business. This was effectuated in the usual way by the formation of a "parent" company, Federated Foundries Ltd., which obtained from the shareholders of the old companies a controlling interest in those companies (including Southern) in exchange for shares in the parent company. Simultaneously all the old companies adopted new and similar articles of association, including a provision by which Federated was given "power at any time . . . by an instrument in writing subscribed on its behalf by two of its directors and its secretary . . . to remove from office any director of the company."

This happened in 1935, and in the course of 1936 Federated entered into negotiations with the plaintiff with a view to entering into a new agreement. When these had failed Federated removed the plaintiff from his office under the powers given by the new articles. The present action for damages for breach of contract was originally brought against both companies, but the action against Federated was either withdrawn or it was decided to let it follow the event of the action against Southern (the latter point is not altogether clear from the report). In any case the interesting questions which might have arisen in connection with a possible "inducement of a breach of contract" by Federated did not fall to be decided by the House of Lords.

The plaintiff won his case before Humphreys, J.; the company's appeal was dismissed by a majority of the Court of Appeal (MacKinnon and Goddard, L.JJ., Sir Wilfrid Greene, M.R., dissenting), and the House of Lords by a majority of three (Lord Atkin, Lord Wright and Lord Porter) to two (Lord Maugham and Lord Romer) affirmed the decision of the Court of Appeal.

The extraordinary difficulties which gave rise to this difference of judicial opinion leap to the eye. They are mainly two: (1) Every single act alleged to constitute a breach of contract was valid in law: the change in the articles of Southern as well as the plaintiff's removal by Federated: the case raises the whole problem of the valid but wrongful act-in-law; (2) the act alleged by A to be a breach of his contract with B emanated from C.

(1) It was undisputed throughout that the alteration of the articles was valid. A company cannot restrict by contract its *power* to change its constitution. Yet, a change of the articles may involve a breach of a contract with a third party. The sanction of contractual or other special rights of members or of third parties is not the invalidity of the changed articles encroaching upon those rights, but a claim for damages against the company. Company law regards that as validly done which, perhaps, according to the law of contracts ought not to have been done. It may be otherwise where the constitution of the company is changed for the *purpose* of injuring an outsider, but it was not even alleged that Southern had changed its articles in order to get rid of the plaintiff.

Again, it was clear that under the old articles the company would have had *power* to remove the plaintiff by extraordinary resolution just as the plaintiff had the *power* to resign by one month's notice in writing, and that under the new articles Federated had the *power* of removing the plaintiff. But, as was pointed out with admirable clarity by Lord Wright, "the

power to dismiss must be distinguished from the right to dismiss." Since contracts of service are not enforced by decrees of specific performance, either party *can* dissolve them at liberty, though he *may* perhaps not do so.

The Master of the Rolls thought that, read together, the old articles and the contract with the plaintiff gave Southern a *right* and not only a *power* to dismiss the plaintiff at will. He refused to read into the contract a promise by the company not to remove for ten years a managing director who, if the promise were kept, would exercise not only managerial but also directorial functions. In the House of Lords, however, Lord Maugham and Lord Romer agreed that, in the words of Lord Romer "there was . . . an implied agreement on the part of Southern that they would not during that period (ten years) exercise their power of removing him from the directorship" under the articles. Lord Atkin pointed to the doctrine of impossibility of performance and to "a positive rule of the law of contract that conduct of either promisor or promisee which can be said to amount to himself 'of his own motion' bringing about the impossibility of performance is in itself a breach." By validly dismissing the plaintiff, Southern would have made it impossible for itself to fulfil its promise to keep him in office for ten years.

It was, on the other hand, agreed on all sides that the mere act of changing the articles did not, in this case, constitute of itself a breach of contract with the plaintiff. The breach of contract, if there was breach at all, was, as Lord Porter put it, "the combined act of both companies."

(2) This raised the problem of the position of Federated in relation to the contract between Southern and the plaintiff. Again, there was no question but that from the point of view of *company law* Federated had acquired the *power* to remove the plaintiff (this was emphasised by Lord Wright). But how could an act validly done by Federated be wrongful in relation to the plaintiff on the ground that it infringed his contract with Southern which, as far as Federated was concerned, was clearly *res inter alios acta*? It would have been thinkable to surmount this difficulty by construing an agency relationship between Southern and Federated and to interpret Southern's new articles as an authority given to Federated to interfere with the composition of Southern's board of directors. But Lord Atkin, though admitting that Federated "derive their power to do the act from Southern only" and that it acted "under powers conferred by contract to interfere with a contract between the party granting the power and a third person," refused to call it "a question of agency," and Lord Maugham could not "understand the suggestion that Federated was acting as an agent, or which is the same thing as a mandatory of Southern . . ., since Southern had not—and indeed never had—any power or influence whatever over Federated" and was unable to object to what Federated was doing. One might, however, respectfully submit that the provision in the articles might have been regarded as an irrevocable authority, a construction which would have removed the difficulties with which the majority judges had to contend.

These difficulties were overcome by Lord Porter by assuming that though neither Southern's change of articles nor Federated's act could of itself be considered as a breach of the contract with the plaintiff, yet the combined effect of both acts was a breach.

Lord Wright gave a deeper foundation to this view, and, in doing so, indicated a new theory of the nature of a breach of contract. If one contrasts his speech with that of Lord Romer one is driven to the conclusion

that what was ultimately at stake in this case was the nature of a breach of contract.

Those who cling to the traditional view of the law of contracts formed under the influence of the action of assumpsit must of necessity look upon a breach of contract as a wrongful act or omission. This was the view taken by Lord Romer. "Had Southern in any way instigated the subsequent exercise of the power by Foundries, their instigation could, no doubt, have been regarded as a breach of their implied obligation, but of any such instigation no trace is to be found." The learned Lord was in vain looking for a wrongful act on the part of Southern which could have constituted a breach, and, in the absence of such act, he, as well as Lord Maugham, was in favour of allowing the appeal.

It is, however, possible, to look upon the contractual obligation not as a promise to do or not to do something, but as an undertaking that something will or will not happen. "The appellants," as Lord Wright put it, "promised that the respondent should hold the office of managing director for ten years," and now that he has been validly removed, they "have to justify his removal." All they can point to is the act of Federated which from Southern's point of view is "self-induced," and, therefore, no justification.

If Lord Wright's speech can be interpreted in this way, the case would seem to be a further milestone on the road on which the law of contract moves away from its original basis in the law of torts.

O. KAHN-FREUND.

Blocked Currencies—Rate of Exchange

The rule that no action can be brought for payment of a sum of money expressed in foreign currency has recently given rise to a number of considerable difficulties. The principle is hardly justifiable under present economic conditions, for it makes it almost impossible for the Court to do substantial justice between the parties where the currency in which the debt was expressed was subject to foreign "blocking" enactments. *Graumann* v. *Treitel*, [1940] 2 All E.R. 188, deserves attention as an illustration of the injustice which can be worked by the operation of the rule preventing an English judge from giving judgment in foreign currency, and also for the further light which it throws on the increasingly important distinction between a claim for "debt" and a claim for "damages."

The parties were, in 1937, partners of a German firm. The partnership terminated on 31st December, 1937, and in June, 1938, the partners came to an agreement, concluded in Berlin, by which the defendant (senior partner) undertook to pay the plaintiff (junior partner) a sum in Reichsmark in final settlement of the partnership accounts. At that time the plaintiff had emigrated from Berlin to London, where, for the last six months, he had been sales manager of an English company subsidiary to the German partnership. Before the last instalment owing to the plaintiff fell due, the defendant emigrated to this country as well. He was now sued by the plaintiff for payment of this sum converted into Sterling at the official rate of exchange prevailing on the date when the debt was due, i.e. on 30th September, 1938.

German law was the proper law of the contract and the defendant contended that it was also the *lex loci solutionis*. The defendant tried in vain to establish that payment would have been illegal under German law without the consent of the currency authorities. It was quite clear that

at the time when the debt matured, both parties were "currency foreigners" from the point of view of German law, and that German currency law, though prohibiting payments by a "currency inlander" to a "currency foreigner," had no objection to transactions taking place between two persons resident outside Germany.

The defendant, however, tried a second and much more promising line of defence. He contended that this was not an action for debt at all, but that what the plaintiff was claiming was damages for breach of contract. There was, however, according to the defendant, no breach because according to the law prevailing at the place of performance, the payment due to the plaintiff (and the only possible form of payment) was remittance in Reichsmark to a blocked account which the defendant had tendered and the plaintiff had refused to accept. A monetary debt, so ran the defendant's argument, may be ubiquitous (a very doubtful proposition indeed), but a claim for damages for breach of contract is localised, it refers to a breach which must have occurred at a particular place, and if there was no breach in the *locus solutionis*, there was no breach at all.

Atkinson, J., followed the defendant's argument in regarding the distinction between debt and damages as material to the issue. He took the criteria of the distinction from English law, the *lex fori*, and not from German law, the *lex causae*, thus implying that it was, from the point of view of Private International Law, a matter of "procedure" and not one of "substance." In spite of certain dicta to the contrary in the Court of Appeal in *Lloyd Royal Belge* v. *Dreyfus*, 27 LL.L.R. 288, the learned judge held that, according to English law, a debt expressed in foreign currency is a debt and not a claim for damages. The process of conversion into Sterling for the purposes of litigation in this country cannot, therefore, be considered as an assessment of damages, but is a mere "exchange operation"—a view which would seem to prevent the judge from taking into account a variety of outside circumstance which seriously affect the "value" of the foreign currency at a time like the present.

It is, however, very doubtful whether the distinction between debt and damages was at all relevant, and whether the defendant was well advised in relying on this distinction. If the money was payable in Berlin and in Berlin only, and if German law prescribed payment in one particular form (remittance to blocked account), all that was owing was payment into a blocked account in Berlin—no matter whether the present action was one for debt or one for damages from the English point of view. This was true, provided Berlin was the place of performance, and whether this was the case was a question of German law.

The learned judge, taking the view that, under German law, the debt had become payable in London,[1] gave judgment for an amount in Sterling corresponding to the Reichsmark sum at the *official* rate of exchange. It is submitted that the proper rate of exchange would have been the value in London of blocked marks at the time when the debt fell due, the latter date being the relevant one under the decision of the Court of Appeal in *Vionnet* v. *Wills*, [1939] 4 All E. R. 136. If a debt is payable at a certain place, its "value" is affected by the way in which it is to be performed

[1] There must have been a misunderstanding of the relevant provisions of the German Code. Under German law the "place of performance" of a monetary debt is the residence of the *debtor* at the time of the *contract*, although the debtor must *send* the money to the creditor from the place of performance. The relevant concluding paragraph of Art. 270 of the German Code was perhaps not quoted to the judge.

at that place. Exchange operations of this kind may have to include the "valuation" of a foreign debt, the omission of which may work serious injustice. As it stands, the judgment confers on the plaintiff a substantial benefit to which he was not entitled under his German contract.

O. KAHN-FREUND.

Current Account—Investment?

The Commissioners of Inland Revenue v. *The Imperial Tobacco Co. (of Great Britain and Ireland), Ltd.* (1940), 3 All E.R. 248 is noteworthy for a really remarkable dictum of Lawrence J., that: "Money on current account with the bank is not, in my opinion, money which is used in the Company's business; it is used in the banker's business." This view will scarcely commend itself to the lawyer, the economist, especially the accountant, or to the business man. Money on current account at a bank, withdrawable without notice, seems just as much capital employed in the trader's business as stock or any other floating asset. Law here seems to part company both with common sense and the admitted principles of accountancy, and it seems best to regard the statement of Lawrence J. as most decidedly *obiter*. The case turned on the question whether interest obtained by a trading concern on its daily balances with its bank was income from investments which was thereby excluded from the scope of the National Defence Contribution by Rule 7 of the Fourth Schedule, Finance Act, 1937.

The learned judge, in holding that interest on current account was income from investments, found support in *Inland Revenue* v. *Gas Lighting Improvements, Ltd.*, [1923] A.C. 723 and in *Liberty & Co., Ltd.* v. *Inland Revenue* (1924), 12 Tax. Cas. 630, which held that sums invested in securities "connected with a business" were none the less investments and that, once a sum had assumed the character of an investment, it did not lose that quality however temporary it may have been. These decisions were in respect of the Excess Profits Duty levied by the Finance (No. 2) Act, 1915, the provisions of which, *inter alia*, excluded investments from the computation of capital employed in a trader's business for the purposes of that tax. *In re Price* (1905), 2 ch. 55, a decision in the contrary sense, was distinguished on the ground that it involved the construction of a will and that this proceeded upon different considerations from the construction of a statute. While a case may be made out for regarding money *on deposit* at a bank as an investment, it seems to the writer that interest received from daily balances at a bank which are withdrawable without notice is no more income from an investment than is interest which a trader receives from his debtors in respect of overdue accounts.

A. FARNSWORTH.

REVIEWS

CONTROL OF ALIENS IN THE BRITISH COMMONWEALTH OF NATIONS. By C. F. Fraser. London: The Hogarth Press. pp. 304. **12s. 6d.** net.

The familiar sentiment that "the foreigner's no good," with or without the concomitant distinction between "Americans" and "foreigners" so dear to the sort of advertisements which begin "A lady (titled), with large house party, would consider . . ." has, one may be tempted in moments of depression to think, a good deal of truth in it. True or not, it is deep-rooted and wellnigh universal. Sensitive people see often a reflection of it in that harsh archaism of the law, the term "alien"; how friendly and welcoming do the words "étranger" and "Ausländer" sound by contrast! Possibly the law, in the frigidity of the terms it employs and the arbitrariness of the powers it confers in relation to these others of God's creatures, but mirrors the feelings of the community it serves. And possibly the text-book writers, who have hitherto neglected the subject of treatment of aliens in a singular degree, are but observing the true tradition of Englishmen. Yet all this is hard to believe. Rather would it appear that there is a deep and growing dissatisfaction with the state of this part of the law. This dissatisfaction is difficult of expression: the party most concerned, the alien, cannot himself complain, and the *locus standi* of others is impaired by the remoteness of their interest and often by an inability to grasp the nature of the problem and of its effects. If this be the true state of opinion, and if the chief obstacle in the way of its expression is imperfect appreciation of the present position, then works of the type of the one before us are most timely.

The picture painted by Mr. Fraser, in so far as it relates to the United Kingdom, is not a pretty one. The fact is that it is competent to the Secretary of State to exclude any and every alien from the realm without assigning any reason for his action. The position in regard to expulsion is virtually the same, though where the deportation order is made on the recommendation of a court of criminal jurisdiction, the recommendation is open to review upon appeal. And there does exist an appeal tribunal which advises—but only advises—the Home Secretary in cases where the order is made otherwise than upon the recommendation of a court. Likewise the Secretary of State has an absolute discretion as to whether or not he will grant a certificate of naturalisation, notwithstanding that the statutory requirements have been satisfied. An unfettered discretion exists also in relation to the revocation of a certificate of naturalization in certain classes of cases. In these cases also no reasons for a particular decision can be had of right. The Secretary of State is thus invested with great powers and, in the words of Mill, "Whatever are the reasons for conferring powers, these also are the grounds for erecting safeguards against their abuse." In fact there are no tangible safeguards. This is well realised by a great section of the people, but what is less fully appreciated is the deliberate concealment of even the main principles of administrative policy. Mr. Fraser, who is described as an official in the service of the Canadian Government, was refused access even to the pre-1914 instructions issued to immigration officers for the express reason that they might indicate to him what were these principles! The few hints he was vouchsafed were far from encouraging. He was told, for instance, that, at a time when difficulty was experienced with foreign waiters landing and securing employment without labour permits, immigration

officers were instructed to treat as suspect all passengers having alarm clocks in their possession, "it having been found that waiters scarcely ever travelled without alarm clocks" (p. 61)! Such a glimpse of the methods of the immigration authorities is not reassuring. And yet the author found that "The Naturalisation Branch of the Home Office was *much less ready* to discuss problems of administration, and on the whole displayed tendencies characteristic of what Lord Hewart would describe as a 'bureaucratic régime'"! Yet it is but a year since Mr. Beckett, of the Foreign Office, felt able to write: "I think . . . that if any qualified person were to show that he intended to produce a serious work on [British nationality law] and had mastered all the material which exists outside the papers of these Government Departments, facilities would readily be given to him both in the Home Office and Foreign Office to look through those papers where any question of principle has been raised and discussed." (*Law Quarterly Review, vol.* LV (1939), 257, 272.)

There can be no doubt that there is need for such control of aliens as will protect the home labour market and ensure the safety of the Kingdom. But there can be no reason on earth why the outlines of policy in regard to aliens should not be public, nor why an applicant for permission to land should not have the privilege of a hearing before some species of tribunal. The case for according applicants for naturalisation, who after all must have resided five years in British territory to be in a position to apply, a judicial hearing is of course much stronger. In the United States, where there is much greater experience of problems of immigration, this is done. The fact that Great Britain has traditionally been a country of asylum for persons with views as diverse as those of Mazzini and Metternich has nothing to do with the question of *method*. Unhappily the days are past when Parliament could afford to enact, as it did in the Aliens Act of 1905, that "in the case of an immigrant who proves that he is seeking admission to this country solely to avoid prosecution or punishment on religious or political grounds, . . . or persecution . . . leave to land shall not be refused on the ground merely of want of means . . ." (5 Edw. VII, Ch. 13, S. 1 (3)). That is no disgrace; in these times of permanent unemployment problems States cannot afford to be generous. But they should be just; and a State comes near to hypocrisy at least when it signs a treaty stipulating *inter alia* that "The restrictions ensuing from the application of laws and regulations for the protection of the national labour market . . . shall be automatically suspended in favour of refugees domiciled or regularly resident in the country, if [e.g.] the refugee has been resident for not less than three years . . .", and then adds a reservation to the effect that this provision "will not be applicable to refugees . . . admitted . . . for a temporary visit or purpose . . ." (see Art. 9 of the *Convention concerning the Status of Refugees coming from Germany*, Geneva, 1938, and the British reservation thereto; Treaty Series No. 8 (1939)). The alien individual should know, and the British public should know what appears to be the case, namely that residence under a permit other than a permit to stay without limit of time does not qualify an alien for benefits under the Convention of 1938 and does not count towards the statutory period prescribed for naturalisation. It may well be that the Home Office has invented the "temporary permit" out of compassion for an additional number of refugees whom the country simply cannot afford to absorb by naturalisation. If so, in justice to the Department itself, that fact should be revealed. Nothing is to be gained

by concealing the general attitude of Government and country towards problems of immigration behind a screen of secret instructions and hole-and-corner methods. If it be—as it must be—the case that the land neither can nor will admit all comers, that is nothing shameful; let it be proclaimed rather than hidden, so that none may be disappointed.

There is, moreover, involved a principle as high as that of generosity to seeker of asylum—that of responsible government itself. It happens "that the Secretary of State sometimes has views of his own as to who should be naturalised and who not," a Home Office official admitted to Mr. Fraser (cf. p. 67). It may be doubted whether the country realises this and, if it be true, what is to protect it from the possibility of accession to office of a Secretary of State who believes that "Niggers begin at Calais" and has "views of his own" as to how niggers should be treated. The author sees this possibility and contents himself with the reflection that "A Home Secretary must always be sensitive to public opinion." But how is public opinion to be directed to the abuse when the responsible authorities work in secret and are accountable to no one?

These are difficult days and it is in general impossible to criticise the wartime policy of the authorities towards aliens. But food for thought in connection with the peacetime régime is provided by the admission of the present Home Secretary that "most regrettable and deplorable things have happened in the execution of the internment policy. . . . They have been due in some cases to mistakes of individuals—stupidity leading to muddle" (*The Times* of 23rd August, 1940). We may properly condemn our enemies for the unforgivable brutality prevailing in their concentration camps, but at the same time we should perceive the beam in our own eye in the shape of a system of secret instructions and unfettered discretions wholly alien to the methods of responsible government. Propaganda becomes more effective the nearer it approaches the truth, and no Nazi propaganda was more insidious or effective than the usual reply to criticism of the methods of the *Polizeistaat*: "Ah, well. It is just the same in your own country but you don't know it."

Mr. Fraser has done a public service in adverting to these matters at this time and, by giving also an account of the methods of control of aliens in the sister-nations of the Commonwealth, has provided useful standards of comparison. But it is to be regretted that, in so far as his account of the law of the United Kingdom goes, he has not qualified for Mr. Becketts' invitation. His exposition is frequently unclear and occasionally incomplete. Thus, while printing in the Appendix—which, incidentally, lacks a table of contents—the text of the Aliens Restriction (Amendment) Act, 1919 *in extenso*, he fails to record the amendments made by the Former Enemy Aliens (Disabilities Removal) Act, 1925. Likewise he does not appear to have noticed the effect of the British Nationality and Status of Aliens Act, 1914, on S. 1 of the Merchant Shipping Act, 1894 (cf. p. 57). He also omits to record the recognition in *R.* v. *Speyer* of the implied repeal of the provisions of the Act of Settlement disqualifying naturalised citizens from holding certain offices; though he refers to that case several times it is not mentioned in the Table of Cases. Moreover, he—or his printer—has ideas about the mode of citation of cases and statutes which are not the accepted ones. It would seem gratuitous to refer in an unusual way to the chapter and regnal year of the same Act twice in two successive pages and to get one of the references wrong (cf. p. 56, n. 2, and p. 57, n. 5).

CLIVE PARRY.

CONTRACTS FOR THE BENEFIT OF THIRD PERSONS. By A. M. Finlay, Ph.D., LL.M. London: Sweet and Maxwell, Ltd. 1939. 145 pp. **10s. 6d.** net.

Here is more proof that a successful degree thesis can result in a successful publication. The subject is one of extreme interest in the sphere of insurance law, and one which has recently merited the consideration of the Law Revision Committee.

"The purpose of the study is to examine the whole course of the law" (Preface) and ends with a discussion of the future of the law. It would, therefore, be well if those who are charged with implementing the recommendations of the Law Revision Committee, direct their attention to this thought-provoking work.

The author starts with a chapter entitled "Comparatively and Historically," but unfortunately does not treat of the difficulties and solutions of other systems of law. English Law to-day is alone in not having devised a complete solution of the third party's rights. The problem might have invited comparative study, though admittedly this is outside the limits the author set himself. Roman Law, for instance, offers an interesting parallel. Both start from the rule that contract is a "bipartite concept." *Nemo alteri stipulari potest.* Both are impeded by the forms of action, to which reason T. A. Street in his "Foundations of Legal Liability" attributes the present rigour of the English Law and its divergence from American Law (p. 141–3). Roman Law, like English Law, resorted to equitable remedies. The late law gave an *actio utilis* in cases, where justice or convenience might demand it. As long as the *ius civile* and *ius honorarium* remained separate systems, no proper rule could be evolved. Justinianian Law saw the complete fusion of law and equity, and so facilitated the development of the *stipulatio alteri*. The Judicature Act has not accomplished this fusion, so that equitable ideas have not operated to free the Common Law from its bilateral limitation. Perhaps only complete fusion would, in the absence of legislation, make possible a complete recognition of the third party's rights. The Law Revision Committee sees a strong analogy in the histories of assignment and the *stipulatio alteri*. And in the former, only direct legislation has fused Common Law and equity.

No doubt, a benevolent judge might try to help a third party, by looking upon the contracting party as his agent. And the author explains the early decision of *Dutton* v. *Poole* (1677), 2 Lev. 210 as based on a "principle of agency arising through close blood relationship." But on the other hand, this may and has always been explained by the fact that at that time the judges were willing to accept "love and natural affection" as "meritorious" and therefore, adequate consideration. The writer does not make out a strong case for his view.

In his treatment of the Common Law the author perhaps fails to separate two rules which, it seems, have collectively impeded the development of the third party's rights. Firstly the rule that the third party is not a party to the contract and, secondly, that the consideration must move from the promisee. Were it not for the second rule, it is conceivable that the Common Law would somehow or other have surmounted the first rule, perhaps by treating it as an offer by the contracting parties, to be accepted by the third party. This would establish complete privity of contract, which seems to be the solution which the Law Revision Committee and the writer advocate. The rule as to consideration has always proved an insuperable obstacle to enforcing the *stipulatio alteri*, and its abolition

might conceivably lead to the recognition of other person's rights, as has been done in other systems, and establish a *vinculum iuris* between him and the contracting party. In this way there is really a contract between three persons.

The author regrets the tardy development of the trustee principle, believes that its proper extension would have made legislation, especially in the field of insurance, unnecessary. For trusteeship can operate where agency cannot. But there is still great uncertainty in the position that equity takes up to the third party, and perhaps immediate results can only be achieved by the legislation recommended by the Law Revision Committee.

Legislation has already done a lot to help the third party, especially in insurance law. But the writer very desirably points out how judicial interpretation has restricted the purpose of the legislature.

In fact, there is little left which a complete recognition of the third party's rights would accomplish. In the sphere of accident insurance, the whole contractual basis of insurance will have to be dropped in order to achieve an effective scheme of third party insurance. Mr. Finlay advocates a scheme of statutory contracts like that operating in New Zealand.

The main advantage of a change in the third party's position will lie in the system of banker's confirmed credits, as pointed out by the Law Revision Committee. The writer gives a very lucid exposition of this system and offers some useful criticisms, to which the reader may be referred. On the principle of the third party's benefit might also be treated a contract by a promoter on behalf of a non-existing company. Agency gives no solution here (*Kelner* v. *Baxter* (1866), L.R. 2 C.P. 174). The writer thinks that even the trustee principle would have enabled the recognition of such contracts. If the third party rule be introduced, whether through equity or legislation, cases like *Touche* v. *Metropolitan Co.* (1871), L.R. 6 Ch. 671 will present no further difficulty. A contracting party could easily stipulate in favour of a non-existing third party.

Recognition of the *stipulatio alteri* would give recognition to the sanctity of contract, by carrying out more effectively the agreement of the parties, for *pacta servanda sunt.* The author might, therefore, have avoided the dark foreboding that this age will see the end of the sanctity of contract. Will not the opposite flow from the recognition of the third party?

The author has to be congratulated on a very able work. Hailing as he does from New Zealand, he has been able to see the fruits of progressive legislation in the field of third party insurance, and make useful suggestions for the improvement of the law of England in several spheres.

B. Beinart.

SOVIET HOUSING LAW. By John N. Hazard. New Haven, Yale University Press; London, Humphrey Milford, Oxford University Press. 1939. Pp. iv and 178. **14s. 6d.**

Dr. Hazard has produced a valuable monograph—the first to appear in English—on the legal aspects of Soviet Housing policy and practice. He has taken full advantage of his study of the law at the Moscow Juridical Institute, and of his three years' residence in the houses with which he deals. He emphasises (inevitably, no doubt) the close association between Soviet ideals and Soviet law. In addition, page after page is vitalised by examples of the working of the law, taken from his own experience and from the official reports of legal decisions. In the result, his book gives

not only a realistic survey of the law, objective and well-balanced between theory and practice, but also a picture of Soviet urban life of interest and value to lawyer and political scientist alike.

The title of the book is perhaps misleading to English lawyers, who tend to associate Housing with nothing wider in scope than the Housing Acts of our own country. The housing problems of the Industrial Revolution were solved—or rather shelved—by a haphazard recourse to the law of landlord and tenant which had emerged from the agricultural economy of the eighteenth century. The urbanisation of this branch of common law has been so slow that even now we scarcely realise that we have created something new, and the very course of its development no doubt explains why we fail to appreciate that the lease of a house is as much the direct concern of Housing in general as slum clearance and town planning. Soviet experience has been fundamentally different. The post-war housing shortage in Russia—aggravated by violent revolution, civil war, and the ignorance of inexperience—was accompanied by a fundamental change in the attitude to property and a wholesale redistribution of occupancy. The law of Housing thus became, simply, the law of houses. Dr. Hazard consequently deals with every aspect of the occupier's position as occupier—his right to dwelling space, his duty to pay rent, to repair, to sub-let, and so on. The only omissions are the small private owner—not an important person—and the country dweller. Were it not for the dangers inherent in the implicit comparison, it would be true to say that the author has given us a study of the whole law of landlord and tenant.

Comparisons with the common law are, of course, inevitable in a work such as this. But we could well have dispensed with the information that the Statute of Frauds requires writing for most leases, that liability for waste was imposed by the Statute of Marlbridge, and that Blackstone treats the Exchange as a common law institution. Fortunately for the peace of mind of one who is not an initiate, such puerile lip-service to the fetish of comparative law is generally absent. The differences are too great for comparison and too obvious for comment. Common law conceptions are used rather as a basis of arrangement than as a standard of comparison. This is as it should be. Something is left to the reader's intelligence. The important thing is that Dr. Hazard has given us a clear and interesting account of an important branch of Soviet law and of the social facts which make that law intelligible. If the English lawyer could be persuaded to read it, he would not fail to draw his own comparisons, and he would thereby learn something of the true nature of his own law as well.

A. D. Hargreaves.

THE TWENTY YEARS' CRISIS, 1919–1939. By Professor E. H. Carr. Macmillan & Co. xv + 313 pp. **10s. 6d.** net.

Professor Carr is Woodrow Wilson Professor of International Relations in the University College of Wales, Aberystwyth, and he has written the most destructive criticism of the attempt to establish a new world order in 1919 that has yet appeared. This paradox best expresses the sense of profound disappointment which one feels in reading this book; and it would be highly interesting to know if Professor Carr still feels as sure as he did that the "realist," as he rather unfortunately terms those who conduct international affairs not only with a complete absence of vision, but also with an absence of elementary common sense, always have the best of it. The truth is that Professor Carr's thesis hitched its wagon to a star whose

zodiacal sign was a neatly-folded umbrella, and with the disappearance of that star passes much of the significance of what he has written. There is a great deal that is brilliant in this book, but it is the brilliance of fireworks which illumine the sky for a moment, leaving nothing permanent behind. For Professor Carr, all those who study or participate in international affairs are divided into two classes—the "Utopians" and the "realists." In his view there can be no question which are the sheep and which the goats. The "realists," curiously enough, are those who live in a world of artificial rules of their own construction, which dissolve at a whiff of grape-shot. Their world is at the moment in ruins around them, and there is no sign that Humpty-Dumpty will ever be put together again. What emerges from this war may be something very different from what any so-called "Utopian" ever planned, but at least Utopians have the merit of having percevied that the game of make believe practised in Europe for the last two hundred years is over. We are passing through an age as important as the sixteenth century. What emerges will obviously not be the old checks and balances system of international relations, in which over-powerful and expansive states are (hypothetically) induced to accept a brief pause in the armaments race by a carefully timed loan. This fact Professor Carr frankly accepts in his concluding chapter, where he shrewdly points out that even without war, "the rearmament crisis of 1939 will produce everywhere changes in the social and industrial structure less revolutionary only than those which would be produced by war itself." That being so, it is surprising to find that the most constructive suggestion which Professor Carr makes for the solution of the problem of peaceful change is the adoption of the bargaining process as used in industrial disputes (p. 277). Surely this is a survival of *laisser-faire* quite inappropriate in the changed world into which we are passing; and the abandonment of this process at the present time shows that it cannot be regarded as an entirely satisfactory expedient in times of stress. When, moreover, the Munich agreement is lauded as "the nearest approach in recent years to the settlement of a major international issue by a procedure of peaceful change" (p. 282), the reader may perhaps be permitted to wonder what kind of an international society the author envisages.

One last word. The lawyer is familiar with the technique of jurists who preface their thesis by a demonstration that they are the only realists, all others being deceived by shams. Has not Professor Carr fallen a victim to the same delusion, for, by a curious coincidence, he applies the Marxian technique in an age when even socialists have doubts of its universal efficacy?

G. W. KEETON.

THE FORMATIVE ERA OF AMERICAN LAW. By ROSCOE POUND. Boston: Little, Brown & Co., 1938.

The "shrewd schoolmaster of the American Bar" as the publisher's note describes the author, gives us, in this collection of essays, another example of his unrivalled art of describing legal developments in terms of general ideas and movements. The theme this time is the so-called formative era of American Law, extending from independence to the Civil War, which does not exclude some reference to the tasks which American Law faces at the present day. Four lectures deal with the respective influence of the Natural Law doctrine, of Legislation, Judicial Decisions and Doctrinal Writing upon the making of American Law, in the formative period. The student of Dean Pound's writings will find in

this volume, on the whole, a reiteration of his well-known views on the law, and he will detect a certain strengthening of conservatism, a tendency to confirm the value of steady tradition, and a strong deprecation of realist and Marxist theories of law. Apart from the abundance of historical material, the most interesting pages are perhaps those in which Dean Pound gives his present view as to the comparative influence of economic and political conditions of time and place on one hand and of legal tradition on the other. "Tenacity of a taught legal tradition," he asserts, "is much more significant in our legal history than the economic conditions of time and place." "The outstanding phenomenon is the extent to which a taught tradition, in the hands of judges drawn from any class one will, and chosen as one will, so they have been trained in the tradition, has stood out against all manner of economically or politically powerful interests." "The role of economics in our legal history has not been one of dictating decision of particular causes or judicial promulgation of particular new rules, but one of raising new wants, new claims, new demands and desires." Dean Pound thinks that in American legal development the man of business, the captain of industry, has had as much cause of complaint about the slowness of the law in responding to pressure of new interests and wants as the labourer. As illustrations he gives the mistrust displayed by Courts against the growth of corporations as the most suitable form of modern commercial enterprise. The argument that the adoption of the fellow-servant doctrine and the interpretation of the rule in *Rylands* v. *Fletcher* is due to economic prejudice, Dean Pound refutes, by analysing the personalities, records and provenience of the judges concerned, such as Chief Justice Shaw. It is certain that the influence of the economic factor, as shaping class interest and prejudice has, in recent years, been often exaggerated at the expense of other factors. Such exaggeration has, among other consequences, led to a lack of understanding of the Nazi movement. Business man capitalists of the type of Neville Chamberlain and Marxists share an outlook based on the *homo oeconomicus*. Nevertheless, Dean Pound's criticism hardly exhausts the matter. Only few would suggest that more than a very small number of judges—except, of course, in totalitarian countries, where they consciously serve political ends—deliberately shape the law in accordance with certain class interests. The process is a more subtle one. Certain conceptions usually prevail among the legal profession, and, owing to its prevalent composition, it is, on the whole, in line with the conceptions of those dominant in their society. Legal continuity and tradition is often subtly moulded so as to serve these interests, often unconsciously. The provenience of any particular judge is no argument against it, for, on the whole, they would adopt the prevalent outlook, just like working-class people who have attained success in a capitalist society. Although the second half of the nineteenth century shows all this much more markedly in American legal history than the first, it is surprising that Dean Pound does not mention at all the development of the "myth of corporate personality," or the use of Natural Law conceptions to thwart state control of social conditions. The power of "taught legal tradition," the desire to administer impartial justice, the force of legal logic, all these extra-economic factors have great importance, and realists have weakened their position by making too light of them. No one over-simplification explains the complex facts of social life. But the nineteenth century, and, as far as the United States is concerned, the second half in particular, has

been the age of the *homo oeconomicus* par excellence, and consequently the interdependence between economic interests and legal development of constitutional principles which could not possibly be interpreted neutrally, was particularly marked. The story of twentieth-century totalitarian law will no doubt be a different one. The legal profession has a strong tendency —now to some extent shared by Dean Pound—to assert the autonomy of the law, and its independence of political trends. Such an illusion, it is submitted, can only be maintained while the foundations of society remain relatively stable. W. FRIEDMANN.

THE LAW OF MARITIME LIENS. By GRIFFITH PRICE. London: Sweet & Maxwell, 1940. **25s.** net.

This is a useful book in that it makes an attempt at combining a scholarly treatise with a practitioner's handbook. In addition, not only does the author explain the intricacies of English law, a task difficult enough in itself, but he also deals in separate chapters with the law in the U.S.A., Germany and France. The last chapter is concerned with the attempts at unifying this very involved subject.

The book thus covers a wide scope, and it is no reflection on the author to say that he has not always succeeded completely. Somehow the book is not sufficiently closely knit, the individual chapters stand one next to the other without the conclusions reached in earlier chapters being used for later ones. This is especially true of the part of the book dealing with the comparative aspect. Probably for the benefit of the practitioner the foreign laws are set out without reference to English law, and the science of comparative law is not advanced as much as one expected when taking up the volume. This is a pity, because when in the last chapter the author does refer to the various systems of law and the various conceptions formed in the minds of lawyers of different nationalities, he succeeds in making it clear not only why unification failed in this particular instance, but why it is generally almost impossible to arrive at a compromise in such matters unless they are of extreme importance.

The English law is set out correctly, as far as can be seen, but a second edition could be much improved by illustrating the propositions of law. The only detail which perhaps deserves mentioning is the treatment of government vessels. This would have merited a rather more detailed discussion in the light especially of *The Cristina* (1938), A.C. 485.

O. C. GILES.

A DIGEST OF THE LAW OF AGENCY. By WILLIAM BOWSTEAD. Ninth Edition, by ARTHUR H. FORBES. Sweet & Maxwell, 1938. pp. 348. **30s.**

This book has rightly won its place as the practitioner's best authority on its subject-matter, and the new edition, admirably produced by the publishers and carefully edited, will more than sustain its reputation. It is the kind of book which English legal practitioners value, all bricks, no straw, and woefully lacking in any attempt to plan and build up a body of principles, or to view the subject historically. It is really an admirable compendium of case law collected under various headings. It suffers from the defects which must follow from an attempt to state the law in the form of paragraphs or articles to which are appended illustrations which

shortly state the facts of cases culled from the Law Reports. At first glance, therefore, the criticism that the work does not attempt to deal with principles would appear to be manifestly unfounded, but the articles are in reality mere pegs upon which to hang a multitude of cases. Nowhere is there any quotation from the judgment of any Court. Indeed, a stranger to our judicial system who read this work might well be led to believe that our Judges never gave reasoned opinions at all, but just recited the facts of the case and then leapt to their judgment. Perhaps the best illustration of the weakness and inadequacy of attempting to codify so summarily the Law of Agency is the last article No. 147, which reads as follows: "Except where otherwise expressly or by necessary implication provided by statute or in the case of a public nuisance, no principal is criminally liable for any act or omission of his agent, unless he authorised or connived at such act or omission." Such a statement of the law provides no help and fails to deal with the central problem. The time has come to pull this book to pieces and rewrite it, and to abandon the attempt to write the law of agency in "wise saws" (as the editor writes in his preface). These "wise saws" are mere jejeune statements, sometimes too general, sometimes too particular, which leave the reader bewildered; he has then to fall back upon the illustrations, which are a wilderness of single instances, and to try to beat his own pathway to such principles as underlie the law of agency. Charles Lamb would undoubtedly have placed this book along with Statutes at Large, Almanacs and Court Calendars under his famous class,—"biblia-a-biblia, books which are not books."

F. Raleigh Batt.